DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS.

DURING THE YEAR 1888

EDITED BY

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1889

ALPHABETICAL LIST OF CASES FOR 1888

PLAINTIFFS AND DEFENDANTS

Plaintiff	Defendant	Nature of case or point	Decision
		A	
Alexandrine ...	Chaillet & ors. ...	Appeal—Security judicatum solvi ...	Objection overruled ...
		B	
Baba ...	Queen ...	Appeal from conviction ...	Dismissal ...
Bangard ...	Queen ...	Do. ...	Appeal dismissed ...
Bedessee & anor ...	Queen ...	Habeas corpus ...	Writ discharged ...
		C	
Canal & or. ...	Philippini ...	Libel—Particulars ...	Particulars must be given
Central Dock ...	Logan ...	Amendment of declaration ...	Amendment allowed...
B. de Chalain ...	B. de Chalain ...	Appeal—Meaning of no costs ...	Appeal dismissed ..
Colin ...	Board of Health ...	Action in damages ...	Judgment for plaintiff
Comrasamy ...	Urcetre ...	Appeal—Verbal lease ...	Appeal dismissed ..
Crécy de Lanux ...	Oriental Bank ...	Res judicata ...	Objection overruled ..
Crécy de Lanux ...	Esnouf & other ...	Certiorari ...	Writ discharged ..
		D	
Derune ...	Derune ...	Divorce for lunacy ...	Action dismissed ..
Duhamel ...	Duhamel ...	Action—Confusion ...	Action dismissed ..
		E	
Engrais Mauricien.	Maurice ...	Appeal—Final judgment ...	Objection overruled ..
		G	
Government ...	Harel & others ...	Appeal from decision of District Court	Appeal dismissed ..
Glaneur ...	Messageries Maritimes.	Action—Tardy arrival of goods ...	Judgment for plaintif
		H	
Hossen Jaffar ...	Queen ...	Assizes—Point reserved ...	Verdict maintained .
Hossen ...	Lebreux ...	Action against guardian ...	Action dismissed .

ALPHABETICAL LIST OF CASES FOR 1888— *(Continued)*.

Plaintiff	Defendant	Nature of case or point	Decision	Page
		J		
ınot ...	Fontenay ...	Action on a will ...	Action dismissed ...	39
		L		
ıasson ...	Descubes ...	Appeal from Master's decision ...	Appeal dismissed ...	125
		M		
hel ...	Pilot & others ...	Partial homologation of a deed of partition	Deed homologated	7
ıty ...	Queen ...	Powers of Superintendent of Internal Revenue	Conviction reversed ...	15
)sajee ...	Municipal Corporation.	Attachment—Arrears of taxes ...	Attachment set aside.	56
)toosamy the wife	Mootoosamy the husband	Divorce—Reconcilation ...	Costs allowed to attorney	26
·el ...	Colonial Secretary ...	Action—Repayment of money ...	Action dismissed ...	112
		N		
rac ...	Hodgson ...	Appeal—Validity of attachment ...	Order set aside ...	116
rainsamy ...	Queen ...	Appeal from conviction ...	Appeal dismissed ...	91
		O		
er ...	Sauzier & or. ...	Certiorari—Execution of judgment at Madagascar	Writ discharged ...	111
		P		
icier ...	Haggard ...	Action against Consul ...	Pleadings amended ...	51
)o. ...	Do. ...	Damages—Denial of justice ...	Judgment for plaintiff.	120
ıcureur General.	Monty & Magistrate of Port Louis	Certiorari—Res judicata ...	Judgment reversed ...	54
ıcureur General.	Bench & Armand ...	Certiorari ...	Writ discharged ...	71
		Q		
een ...	Aliphon ...	Assizes—Point reserved ...	Judgment for accused.	20
een ...	H. Darney & others...	Certiorari—Lodgings to Labourers.	Judgment reversed ...	12
		R		
ffaut ...	Mauritian Marine Insurance Company	Claim for loss of ship ...	Judgment for defendant	5
ssool ...	Flowerd[illegible] ...	Appeal from Seychelles ...	Judgment reversed ...	47
id ...	Oriental Bank ...	Claim of share of water ...	Judgment for plaintiff.	1

ALPHABETICAL LIST OF CASES FOR 1888— *(Continued)*

Plaintiff	Defendant	Nature of case or point	Decision
Reid ...	Oriental Bank ...	Provisional execution pending appeal.	Motion refused ...
Rose ...	Desmarais & anor ...	Certiorari ...	Judgment reversed ...
		S	
Seenarain ...	Ramtohul & ors ...	Appeal—Jurisdiction ...	Appeal dismissed ...
Sidick (Haroon)...	Peterson ...	Action on charterparty ...	Action dismissed ...
Sylvain ...	Tourrette ...	Appeal—Rights of auctioneer ...	Appeal dismissed ...
		T	
Tourrette ...	Dardanne & ors ...	Action—Oral evidence ...	Evidence allowed ...
		V	
Vilbro ...	Chellen ...	Appeal—Value of Land ...	Affidavits to be sworn.
Vythilingum ...	Sooprayen ...	Appeal—Trust ...	Appeal dismissed ...
		W	
Waicott ...	Cassim Mamoojee ...	Action—Demurrage ...	Judgment for plaintiff.

INDEX OF MATTERS FOR 1888

ABANDONMENT—Though goods are ordered for a special occasion which has passed by upon their landing tardily, this is not sufficient to justify their total abandonment ... ... P. 77

Do. *Vide* INSURANCE.

ACQUITTAL—It is not sufficient for parties to set up as a defence, that they, *bona fide*, believed that they had a colorable title, but they must show, to the satisfaction of the Magistrate, that they really had a colorable title, ... P. 122

ADJUDICATION—The final price of adjudication at the bar of the Master is deemed to be the final and definitive value of the property (Ordinance 19 of 1868, Art. 203) ... ... P. 56

AFFIDAVITS—Parties to a judgment by consent cannot file affidavits in a subsequent suit, to explain what they meant under the compromise arrived at ... ... P. 24

Do. *Vide* APPEAL.

AMBIGUITY—Ambiguous expressions must not be used in pleas to criminal Informations, and in decisions of Magistrates. ... ... P. 54 & 90

AMENDMENT—The Supreme Court will amend a declaration or plaint, when the principal question in issue remains exactly the same, after, as well as previous to, the amendment....P. 8

Do. When a plea of protection or privilege had not been clearly pleaded in answer to an action in damages for a tort, the Court gave leave to the defendant to amend his pleadings. ... ... P. 51

APPEAL—When the true value of the subject matter of a claim does not appear from the Record, that value, on appeal, must be established by affidavits. ... ... P. 22

Do. When an order by a Court of first instance has a character of finality and places a party in the impossibility of moving further in the matter, the right of appeal lies ... ... P. 29

Do. The Court, under certain circumstances, will not grant a provisional execution of its judgment pending an appeal to the Privy Council. P. 30

Do. The Commission of the Acting District Magistrate of the smaller dependencies is not dissolved by his appointment as Acting District Magistrate for one of the Districts in Mauritius ... ... P. 32

Do. Right of appeal—When a District Court refuses an amendment and strikes out the case and refuses to nonsuit the plaintiff, the order of the Magistrate has a character of finality and the plaintiff has the right to appeal therefrom ... P. 86

Do. The real matter at issue in a question of appeal is not the amount of the costs a plaintiff, whose case has been struck out, has been ordered to pay, but the amount claimed from the defendant in the principal action itself ... ... P. 86

Do. When a party to a suit has not moved that certain other interested persons should be made parties to the suit, he cannot afterwards, on appeal, complain of their absence in the Court below ... ... P. 104

APPEARANCE—When the rights of a party to a suit are not put in question in the declaration or plaint, that party, being not properly a contradictor in the case, need not absolutely put in an appearance ... p. 104

ASSAULT—A party charged with larceny with violence and with assault with intent to rob, cannot be found guilty of simple assault ... ... p. 20

ASSIGNMENT—Unconditional assignment of bankrupt's property—*Vide* TRUST.

ATTACHMENT—An attachment for arrears of taxes due by a former owner, having been lodged after the distribution of the sale price into the hands of the purchaser of the immoveable property at the bar of the Master, it was set aside as having been lodged too late ... ... p. 56

Do. *Vide* AUCTIONEER AND COMPENSATION.

Do. Validity of attachment contested; vide Jurisdiction.

AUCTIONEER—An auctioneer has a right to claim in his own name the sale price from the purchaser in order to distribute the same to the interested parties, after deduction of his commission and other charges ... p. 100

Do. An auctioneer must keep the proceeds of the sale in his own hands for three days, for the purpose of allowing the creditors of the vendors to lodge an attachment (Ordinance 3 of 1838, section 10) ... ... p. 100

Do. The auctioneer entrusted with the sale is answerable to the vendor, and not the auctioneer whom the first may delegate to make the sale p. 100

AUTHORITY — Abuse of authority by Magistrate is ground for an action in damage (V. Damages). ... p. 120

AUTREFOIS ACQUIT— } *Vide*
AUTREFOIS CONVICT— } RES JUDICATA.

AYANT CAUSE—When a party can insist upon the "ayant cause" particulier, fulfilling an agreement originally entered into with the author of that "ayant cause", the latter, in his turn, is entitled to insist upon that party fulfilling towards him the share of the obligations incumbent upon the party under the agreement ... ... p. 1

BANKER'S BOOKS—The Banker's Books' Evidence Act of 1879 applies only to Banks to which are going concerns and which have numerous references to make each day to previous entries in books, and not to Banks in liquidation ... ... p. 88

Do. A Bank, even when in liquidation, cannot be called upon to produce all its Books, in order that a complainant should hunt up evidence of a misdemeanor alleged to have been committed several years before ... ... p. 88

BENCH—Full Bench *Vide* POINT RESERVED

BENCH OF MAGISTRATES— *Vide* DISTRICT MAGISTRASES.

BENEFIT OF INVENTORY—*Vide* HEIRS.

BILL OF LADING—The terms of a Bill of lading should be construed with absolute strictness... ... ... p. 77

BOARD (GENERAL)—Ordinance 8 of 1874 does not expressly authorize the General Board to do acts which would restrict the use of his property by a private person... ... ... p. 70

Do. As the terms of Ordinance 8 of 1874 are not imperative but permissive, the inference is that the legislature intended that the discretion, as to the use of the general powers conferred on the Board, should be exercised in strict conformity with private rights ... ... p. 70

Do. When a person is infected with a contagious disease which may be the primary cause of an epidemic of a formidable nature, it is the right and duty of the constituted authorities to interfere for the protection of society, and if it becomes thereby absolutely necessary to place some restraint on individual freedom, or even the enjoyment of private property, no indemnity can be claimed (*Art. 42 of Ordce. 8 of* 1874) ... ... P. 40

CAPTAIN—*Vide* MASTER—INSURANCE.

CHARTER-PARTY—If a Charterer agrees to pay a gross sum for the whole vessel, the payment is no more affected by the quantity actually carried, than the hire of a house would be by the use or non use made of it. P. 95

Do. If a charter-party requires that the ship be loaded with a full cargo or to her utmost capacity, the hirer is not obliged to put in, and if he offers, the Master is not obliged to receive more cargo than she can safely carry, although all the space is not filled ... ... P. 95

Do. There is no custom of trade in Mauritius that, when a notice is served after noon, the lay days begin to run not on the day following the reception of the notice, but on the next following day ... ... P. 117

CHOSE JUGÉE—*Vide* RES JUDICATA.

COLLOCATIONS—*Vide* HOMOLOGATION.

COMPENSATION — When a sale takes place through an auctioneer for the benefit of all the creditors of the vendor, one of those creditors who purchases the things sold, cannot invoke compensation. Art. 625, C. P. C. ... ... P. 100

CONFUSION—Of Evidence — *Vide* EVIDENCE.

CONFUSION—In order that confusion should take place, the debtor must have the full ownership, and not the mere usufruct of the claim ... P. 59

CONSTRUCTION—Construction of Deed. *Vide* BILL OF LADING.

CONSUL—When the British Consul at Madagascar acts on the criminal side, seems that he is entitled to the protection extended to Magistrates by 11 and 12 Victoria Ch. 44 ... P. 51

CONSUL — When the British Consul at Madagascar acts in the exercise of his functions, he is entitled to the protection which the Common Law of England, apart from the statutes, extends to Judges of Courts of Record ... ... P. 51

Do. The plea that the Consular Judge was acting within his jurisdiction must be clearly pleaded ... P. 51

CONSULAR COURT—The Supreme Court of Mauritius has concurrent jurisdiction with the Consular Court of Madagascar in all suits arising in Madagascar, between British Subjects.. ... ... P. 51

Do. An action in damages against the British Consul for a tort caused by him in Madagascar, was properly entered before the Supreme Court of Mauritius, as the Consul could not have been properly sued in his own Court ... ... P. 51

Do. The British Consular Court at Madagascar should be looked upon, not as a Superior, but as an inferior Court of Record ... ... P. 120

Do. The Supreme Court of Mauritius has no power to issue an injunction to the British Consular Court at Madagascar. ... ... P. 120

Do. *Vide*: Execution of Judgments obtained in Mauritius ... ... P. 111

CORPORATION—When illegal acts are committed by officers of a Corporation, acting ostensibly for the said Corporation, the latter is primarily responsible ... ... P. 40

Do. When illegal acts are committed by, or with the sanction of a Corporation, the approval thereof by the head of the Colony, cannot prevent the Corporation from being sued in damages. ... ... P. 40

COSTS—*Vide* HEIRS.

Do. A majority of the Judges found a plaintiff liable to pay costs of an amendment, though the amendment was opposed by the Defendant. P. 8

Do. A reconciliation having taken place pending a suit in divorce, the husband (Defendant) was found liable to the wife's attorney for the costs incurred at the request of the wife in the suit itself, and for the costs made in an application for provision under Art: 878 C. P. C., but not for the costs of an application referred from Chambers to Court, to allow the wife to "ester en jugement" in a complaint entered by her against her husband, before the District Court. P. 26

Do. On a certiorari, each party having been successful in a certain measure, the Court divided the costs... P. 122

COURT—(Supreme). The Supreme Court of Mauritius has concurrent jurisdiction with the Consular Court of Madagascar in all suits arising in Madagascar between British Subjects, and an action for tort against the British Consul can be entered in Mauritius before the Supreme Court ... ... P. 51

COURTS—No action lies against the Judges of the Superior Courts of Record in England, for refusal to act... P. 120

Do. Inferior—When Inferior Courts in England refuse to act, the remedy is an injunction. ... ... P. 120

Do. The Supreme Court of Mauritius has no power to issue an injunction to the British Consular Court of Madagascar. ... ... P. 120

CREDITOR—A Mortgage creditor is bound to give a regular discharge to the "tiers détenteur" (purchaser) who pays a mortgage debt... ... P. 47

CUSTOM OF TRADE — *Vide* CHARTER-PARTY AND LAY DAYS.

DAMAGES—When a person is infected with a contagious disease which may be the primary cause of an epidemic of a formidable nature, restraint imposed by the constituted authorities on individual freedom, or the enjoyment of private property, does not give rise to an action in damages ... ... P. 40

Do. Contrary view held by one Judge 40

Do. The measure of damages for delay in delivery of goods, is not the profit that might have been made if they had been delivered in time, but the actual depreciation in the market value, between the date at which they should have been delivered and that of their actual delivery ... P. 77

Do. No damages are due to a party, owing to the fact that he is compelled to postpone his departure from the Colony, to bring his case before the Courts ... ... P. 117

Do. No action lies against the Judges of the superior Courts of Record in England for refusal to act ... P. 120

Do. The only civil remedy to the litigant against a refusal to act from the British Consul at Madagascar is an action in damages ... ... P. 120

Do. A Consul or Magistrate who refuses to hear a case brought before his Court, is guilty of an abuse of his judicial authority ... ... P. 120

DECLARATION—A declaration in a case of libel should contain full particulars of the place, time etc., of the libel *Vide* Procedure ... ... P. 114

DELIVERY—Tardy delivery *Vide* DAMAGES.

DEMURRAGE—*Vide* CHARTERPARTY.

DISCHARGE—*Vide* MORTGAGE AND TIERS-DÉTENTEUR.

DISEASE— Contagious Disease, *Vide* DAMAGES.

DIVORCE—Sœvitiœ on the part of the husband is cause for restraint, but not for divorce, when they result from mental unsoundness, even when that unsoundness was not suspected before marriage ... ... P. 28

Do. A withdrawal of an action in divorce on account of a reconciliation is not at all equivalent to a dismissal of the action ... ... P. 26

Do. *Vide* COSTS.

DISTRICT COURTS—A District Court, or Bench of Magistrates, cannot be called upon to proceed with a criminal trial, when the evidence heard before them discloses a higher offence than the one charged in the Information, and when the higher offence is one as to which the Magistrate or Bench possesses no jurisdiction ... ... P. 71

Do. Jurisdiction in actions entered by widows, married under the regime o communauté.—*Vide* JURISDICTION.

DISTRICT MAGISTRATES — The Commission of the Acting Magistrate of the smaller Dependencies is not dissolved by his appointment as Acting District Magistrate for one of the Districts in Mauritius... ... P. 32

Do. District Magistrates should keep their Records as complete as possible, and should make full entries therein. P. 34

EMBEZZLEMENT—In a charge of embezzlement, the Information should state whether the thing embezzled had been entrusted in virtue of a deposit or in virtue of a trust, deposit and trust being different contracts ... ... P. 90

Do. When the Information charges embezzlement of a thing entrusted in virtue of a deposit or trust, there is no ambiguity, if the Information states at the same time, that the thing was entrusted for the purpose of being pledged ... ... P. 90

EPIDEMIC—*Vide* DAMAGES.

ERROR—The Court possesses the power of rectifying an error committed by a testator in his last will, and substitute therein one name for another ... ... P. 39

EVIDENCE—The Banker's Books Evidence act of 1879, applies only to Banks which are going concerns and which have numerous references to make each day to previous entries in Books, and not to Banks in liquidation ... ... P. 88

Do. A Bank, even when in liquidation, cannot be called upon to produce all their books in order that a complainant should hunt up evidence of a misdemeanour, alleged to have been committed several years before. P. 88

Do. The Magistrate is not required to give a formal decision to the effect that the witness is hostile, before he can allow the witness to be contradicted ... ... P. 90

Do. The mere memorandum of a survey, taken *ante litem motam*, and unsworn to, cannot be considered as evidence on a disputed question of fact about a charter party ... ... P. 95

Do. The opinion of a Master as to how far his ship can be safely loaded, is entitled to great weight and is controlable only by decisive evidence of a mistake on his part... ... P. 94

Do. Confusion of evidence must sometimes arise in cases in which a claim is made under a verbal lease, and in case of denial of the lease, for the illegal use and occupation of premises ... ... P. 102

Do. It is competent for a plaintiff to examine a defendant on his personal answers, in order to try to obtain from him an admission of the existence of an alleged contract of lease. P. 103

EXECUTION—The Supreme Court, under certain circumstances, will not grant a provisional execution of its judgment, pending an appeal to the Privy Council ... ... P. 30

Do. A judgment obtained in the Supreme Court of Mauritius, can be executed by order of the British Consular Court at Madagascar, after the judgment debtor, there domicile d, has been called upon to show cause, if any, against its execution ... ... P. 111

FAITH—Good faith—*Vide* TITLE.

FAUTE—When a plaintiff is dealing with a matter beyond his power of inspection, it is very difficult, if not impossible, for him to obtain direct evidence of the defendant's fault or negligence. He may, then, establish his case by presumptions or circumstancial evidence ... ... B. 60

Do. In action in damages caused by "faute" or "négligence", the Law applicable in Mauritius is the Code Civil ... ... P. 60

Do. Although the Mauritius Government be authorized to use steam Engines on their Railway Lines, they are bound to pay for the damages caused by the said "Engines", when there has been "faute" or "négligence"... ... ... P. 60

FORGERY—A distinction must be made in the information, between forgeries by the counterfeiting of genuine signatures and forgeries by the use of a fictitious name... ... ... P. 78

GUARDIAN—The guardian is not bound to invest by way of Mortgage the moneys of his ward, unless the family Council made this a condition of his appointment ... ... P. 49

Do. He is not bound to act concurrently with the subguardian, unless he was appointed under that condition by the family Council ... ... P. 49

Do. Subguardian should not interfere with the administration of the guardian, unless there be any danger threatened to the minor's funds, or "mauvaise gestion"... ... P. 49

HABEAS CORPUS—The amount of a recognizance on the Criminal side may be recovered as a fine, and the payment thereof can be enforced by imprisonment at once, without previously issuing a warrant of distress against the moveables ... P. 34

Do. An amended warrant of commitment may be put in at any time, before the return to the writ has been made ... ... P. 34

Do. On a writ of Habeas Corpus, the Court will generally look only at the warrant, in order to ascertain whether the prisoner has been lawfully committed, and not at the record... P. 34

HEIRS—Heirs under benefit of inventory may be considered as having consented to bear costs incurred by them on a proceeding by "folle-enchère", when the judgment by consent secures to them the costs of a judicial sale begun by them ... ... P. 24

HOMOLOGATION (partial)—The Court may homologate a deed of partition, in so far as undisputed collocations are concerned ... ... P. 7

HOSTILITY—In a witness—*Vide* EVIDENCE and WITNESSES.

INDEMNITY—Right of indemnity for partial eviction or damage done to an Estate, does not pass to subsequent purchaser, who is presumed to have paid only an inferior price for a property thus lessened in value ... P. 1

INFORMATION—An Information which embodies the words of the Statute and nothing more, is good in law... P. 46

Do. A distinction must be made in the Information between forgeries by the counterfeiting of genuine signatures and forgeries by means of a fictitious name ... ... P. 73

Do. In a charge of embezzlement, care should be taken to state in the information whether the thing embezzled had been entrusted in virtue of a *deposit* or in virtue of a *trust*; deposit and trust are two different contracts ... ... P. 90

Do. In an information charging embezzlement of a thing entrusted in virtue of a deposit or trust, the ambiguity ceases, when it is added that the thing was entrusted for the purpose of being pledged ... ... P. 90

INJUNCTION—*Vide* COURTS—DAMAGES—JURISDICTION.

INLAND REVENUE—The Superintendent of Inland Revenue has no right to prosecute offenders under the Penal Code—*Vide* PROSECUTION.

INSURANCE—The abandonment of a ship is not justifiable, till all reasonable efforts have been made to save the ship ... ... P. 4

Do. It is incumbent upon a Captain who by abandoning his ship has become the agent of the insurers, to communicate in time to the latter the conclusion arrived at by him, so that they should take steps to protect their interests... ... ... P. 4

Do. The Master who sells an abandoned ship, must make a serious and adequate attempt to get local tenders from intended purchasers ... ... P. 4

INTERPRETATION—Parties to a judgment by consent cannot file affidavits in a subsequent suit, to explain what they meant under the compromise arrived at ... ... P. 24

JUDGE—(at chambers) *Vide* JURISDICTION.

JUDGMENT—The Court, under certain circumstances, will not order a provisional execution of its judgment pending an appeal to the Privy Council. P. 30

Do. A party who has obtained a judgment in the Supreme Court of Mauritius, against an individual domiciled in Madagascar, may again take judgment against his debtor in the Consular Court there ... ... P. 104

Do. A judgment obtained in the Supreme Court of Mauritius can be executed by order of the British Consul at Madagascar, after the judgment debtor, there domiciled, has been called upon to show cause, if any, against its execution ... ... P. 111

Do. A judgment obtained before a foreign Court of competent jurisdiction, is accepted by the Courts of England as being, *prima facie*, conclusive between the parties; but its validity may be questioned ... ... P. 111

JURISDICTION—The Supreme Court of Mauritius has concurrent jurisdiction with the British Consular Court of Madagascar in all suits arising there between British subjects ... P. 51

Do. A Magistrate or Bench of Magistrates cannot be called upon to proceed with a criminal trial, when the evidence heard before them discloses a higher offence than the one charged in the information, and when the higher offence is one as to which the Magistrate or Bench possesses no jurisdiction ... ... P. 71

Do. A widow, formerly common in property with her late husband, sues in her own right when she asks that a squatter on land, once forming part of the community, be ejected, and the District Court is competent, as such action has nothing to do with the interpretation of a contract of marriage or a disputed question of inheritance ... ... P. 104

Do. The Judge at Chambers has no jurisdiction to hear and decide on the validity of an attachment which is opposed. He has power, when opposition is disclosed, to refer the matter to the full Court ... ... P. 115

Do. A District Magistrate after, acquitting parties, for alleged trespass on disputed land, has no jurisdiction to give to them the order not to disturb the complainant; the remedy to complainant is an injunction obtained from the Supreme Court ... ... P. 122

KNOWLEDGE — Guilty knowledge need not be charged in the Information, when the Penal Section does not contain the word "knowledge" or "knowingly."... ... ... P. 46

LABOUR LAW—Under Art. 223 of the Labour Law, the employer is imperatively bound to provide his labourers with lodgings. The object of the Article is to enact sanitary regulations for the dwellings of Indians who work on Estates ... ... P. 11

Do. The employer and labourers cannot agree that the latter will not reside in a camp provided by the owner on the Estate, but in lodgings under the control of a stranger... ... P. 11

LARCENY—With violence. *Vide* ASSAULT.

LAY DAYS—There is no custom of trade in Mauritius that when a notice is served after noon, the lay days begin to run not on the day following reception of the notice, but on the next following day... ... ... P. 117

LEASE—Verbal lease—*Vide* EVIDENCE AND PERSONAL ANSWERS.

LIBEL—*Vide* DECLARATION—PROCEDURE.

LICITATION—A person who is not a party to a licitation cannot appear and move for the nullity of the same (Ordinance 19 of 1868—Sections 85, 86 & 103) ... ... P. 104

LOADING—The opinion of the Master how far his ship can be safely loaded is entitled to great weight ... P. 94 *Vide* CHARTER PARTY—MASTER—SHIP

LODGINGS—*Vide* LABOUR LAW.

MASTER—Master is not to abandon his ship till all reasonable efforts have been made to save the same ... P. 4

Do. The Master must make a serious and adequate attempt to get local tenders from intended purchasers, after abandonment of the ship ... ... P. 4

Do. The Master who abandons his ship becomes the agent of the Insurers. He is bound to communicate to them, in time, the conclusion arrived at, to enable them to take steps to protect their interests... ... ... P. 4

Do. of a ship—His opinion on the question how much his ship can safely carry, is entitled to great weight, and is controlable only by decisive evidence of a mistake on his part... ... P. 94

MATTER AT ISSUE — Value of — *Vide* APPEAL ... ... P. 86

MORTGAGE—The tiers détenteur is liable for the mortgage debts, even when he has not taken charge of the same in his deed of acquisition, and is, consequently, entitled to ask the creditor for a discharge when he pays such a debt ... ... P. 47

ORDER—An order of a Court of first intance which has the character of finality and which prevents a party from moving further, is liable to be appealed from... ... ... P. 29

PARTITION — Deed of — *Vide* HOMOLOTION.

PARTNERSHIP—*Vide* DEED OF PARTNERSHIP—PROPERTY—EVIDENCE.

PERSONAL ANSWERS—It is competent for a plaintiff to examine a defendant on his personal answers in order to try and obtain from him an admission of the existence of an alleged contract of lease... ... ... P. 103

POINT RESERVED—The full Bench will not consider a point which was not clearly reserved during the trial at the assizes, unless all the parties deal with it as if it had been reserved by implication ... ... P. 73

PRINCIPAL—Responsability of principal —*Vide* Corporation and Responsibility ... ... P. 40

PROCEDURE— The plea that a Magistrate or Judge was acting within his jurisdiction must be clearly pleaded to an action in damages for a tort ... ... P. 51

Vide AMENDMENT.

Do. Absence of interested parties and non appearance of party summoned, but whose rights are not put in question. *Vide* APPEARANCE.

Do. A declaration for libel or slander should mention the places where, the times when, and, if possible, the names of all the persons to whom the alleged libel or slander was published... ... ... P. 114

Do. *Vide.* Reference to District Court after amendment ... ... P. 8

PROPERTY—Oral evidonce is admissible when a party does not seek to establish a deed of partnership, with all its clauses, but merely to prove that certain moveables are the common property of plaintiffs and defendant, and when there is, besides, a beginning of proof in writing ... ... P. 79

PROSECUTION—The privilege of prosecution under the Penal Code belongs (a) to the party injured himself (b) to the Procureur General (Ord: 29 of 1853) and (c) to the Police (Ord: 11 of 1860). ... ... P. 15

PROTECTION—When the British Consul at Madagascar acts in the exercise of his functions, he is entitled to the protection which the Common Law of England, apart from the statutes, extends to Judges of Courts of Record... ... ... P. 51

Do. When he acts on the Criminal Side, he seems to be, besides, entitled to the protection extended to Magistrates by 11 and 12 Vict. C. 44. ... P. 51

RAILWAYS—Though the Mauritius Government be authorized to use steam Engines on their Railway lines, they are bound to pay for the damages caused by "faute" or "négligence"... ... ... P. 60

RECOGNIZANCE—*Vide* HABEAS CORPUS. The amount of a recognizance on the Criminal Side may be recovered as a fine, and the payment thereof can be enforced by imprisonment at once, without previously issuing a warrant of distress against the moveables... ... ... P. 34

RECONCILIATION—A withdrawal of an action in divorce on account of reconciliation is not equivalent to a dismissal of the action. ... P. 26

RECORD—District Magistrates should keep their Records as complete as possible, and should make full entries therein... ... ... P. 34

Do. On a writ of Habeas Corpus, the Court will generally look at the warrant in order to see whether the prisoner has been lawfully committed, and not at the Record. ... P. 34

Do. The Record of an appeal on the Criminal side to the Supreme Court cannot be added to afterwards, by the introduction therein of the shorthand writer's notes, to show that the ground of the decision of the Court of Appeal was the incompetency of the information in the Court below ... P. 54

REFERENCE—After the amendment of a declaration, though the reduced amount claimed makes the case cognizable by the District Court, the Supreme Court will retain the same, as there is no form of procedure known for referring a case to an inferior Court, under such circumstances ... P. 8

RES JUDICATA — When several parties are jointly and severally liable, any judgment given in favour of any one of them may be invoked by others ... ... P. 19

Do. A judgment which is being appealed from is not final, and cannot have the authority of "res judicata" ... ... P. 19

Do. The Court cannot consider its decision upon points already raised by the plaintiff against another defendant in a former suit, as being "res judicata" or even "ratio scripta" and prohibit the plaintiff from again raising them ... ... P. 19

Do. Res judicata may mean "autrefois acquit" or "autrefois convict".—Such an ambiguous expression should not be used in a plea to an information, and the Magistrate's judgment must show whether he considers that the accused has been already acquitted or already condemned ... P. 54

RESPONSIBILITY—When illegal acts are committed by officers of a corporation, acting ostensibly for the said corporation, the latter is primarily responsible ... ... P. 40

Do. When illegal acts are committed by, or with the sanction of, a Corporation, the approval thereof by the head of the Colony cannot prevent the Corporation from being sued in damages ... ... P. 40

RETURN — To Habeas Corpus — *Vide* HABEAS CORPUS.

RIGHT—The right of claiming repayment of excess of interest on a mortgage debt is a personal, not a real, right. The purchaser (tiers détenteur) is not, therefore, entitled to make such deduction from the debt due by him. *Vide* TIERS-DÉTENTEUR.

SET OFF—*Vide* COMPENSATION.

SHIP—Under the statute 39 and 40 Vict. Chapter 80, Section 25 et alia, the test must be how far the ship shall be loaded in salt, not in fresh, water ... ... P. 95

Do. If a Charterparty requires that the ship be loaded with a full cargo or to her utmost capacity, the hirer is not obliged to put it, and, if he offers the Master is not obliged to receive more cargo than she can safely carry, although all the space is not filled ... ... P. 95

SUBGUARDIAN—Cannot call upon the guardian of a minor to show cause why he should not invest by way of mortgage a certain sum which the guardian is going to receive, unless the family council decreed that the acts of the guardian should be made with the concurrence of the subguardian. ... ... P. 49

Do. Subguardian should not interfere with the administration of the guardian, unless there be danger threatened to the Minor's funds, or "mauvaise gestion", or unless the family Council has authorized him to do so.. P. 49

SUPERINTENDENT—*Vide* INLAND REVENUE.

SURVEY— The mere memorandum of a survey taken "ante litem motam," and unsworn to, cannot be considered as evidence on a disputed question of fact about a charterparty ... P. 95

TESTAMENT — The Court possesses the power of rectifying an error committed by the testator in his last will, and to substitute therein one name for another ... ... P. 39

TIERS-DÉTENTEURS—The "Tiers-détenteur" is liable for the mortgage debts, even when he has not taken charge of the same in his deed of acquisition, and, consequently, is entitled to ask the creditor for a discharge, when he pays such a debt ... ... P. 47

Do. The tiers-détenteur is not entitled to deduct from the mortgage debt due by him, as purchaser, any sum as excess of interest paid to the creditor by the vendor. That right is a personal, not a real, right ... ... P. 125

TITLE—Colorable title. In order that tress-passers on land should be acquitted, it is not sufficient that they *bona fide* believed that they had a colorable title, but they must show, to the satisfaction of the Magistrate, that they really had a colorable title ... P. 122

TRESPASS—*Vide* TITLE.—JURISDICTION.

TRUST—When a trustee had bound himself jointly and separately with certain bankrupts, to pay the creditors and, when in consideration of such security, he had had assigned to him all the joint and separate Estate of the bankrupts, the surplus, after such payment, was held to belong not to the bankrupts but to the trustee ... P. 107

Do. Under the above circomstances, the Bankrupts are only entitled to ask for proof that their debts have been fully paid by the trustee ... P. 107

WARRANT—An amended warrant of commitment may be put in at any time before the return to a writ of habeas corpus has been made:.. ... P. 34

WILL—*Vide* TESTAMENT.

WITNESSES—The Magistrate is not required to give a formal decision to the effect that the witness is hostile, before he can allow the witness to be contradicted ... ... P. 90

JUDGMENTS OF THE SUPREME AND OTHER COURTS

OF

MAURITIUS

EDITED BY

L. A. THIBAUD

BARRISTER-AT-LAW

1888

SUPREME COURT

—

CANAL—PAYMENT OF SHARE OF EXPENSES—PERSONAL CLAIM—AYANT CAUSE PARTICULIER—NO SPECIAL TRANSMISSION OF RIGHTS—OBLIGATIONS OF THE AYANT-CAUSE—RECIPROCAL OBLIGATION OF THE OTHER PARTY TO AGREEMENT.

The Court by a previous judgment had acknowledged the right of plaintiff to one half of the water in a certain canal, on defendants' Estate, on condition of his paying one half of the expenses of building the said canal.

The points raised were:

1o. *That the money was payable not to the present plaintiffs but to their vendors who had built the canal.*

2o. *That the claim of the said vendors was a personal one, and as the present defendants were not in law the "ayant-cause" of their vendors, and as there had been no special transmission of such claim to the purchasers (the defendants) the latter could not be entitled to the claim.*

Held by the Court:

1o. *That when in consequence of a partial eviction, for instance, or of damage done to a property, a right to indemnity has arisen, that indemnity does not pass to the subsequent purchaser who must be supposed to have paid only an inferior price for a property thus lessened in value.*

2o. *That in the present case, however, the canal being nearly completed when the defendants purchased the Estate they must be considered as having paid a higher price in consideration of that appurtenance of the Estate.*

3o. *That when a party can insist upon the*

" ayant-cause particulier" fulfilling an agreement originally entered into with the author of that " ayant-cause," the "ayant-cause" in his turn is entitled to insist upon that party fulfilling towards him the share of the obligations incumbent upon him under the agreement.

—

REID,—Plaintiff

and

THE ORIENTAL BANK CORPORATION IN LIQUIDATION,—Defendants.

—

Before

His Honor Sir E. J. LECLÉZIO KT.—Chief Judge

and

Their Honors F. C. WILLIAMS and J. ROUILLARD.—Puisne Judges.

—

H. GALÉA,—Counsel for plaintiff.
W. EDWARDS,—Attorney for the same,

L. CHASTELLIER and W. NEWTON,—Counsel for defendant.

E. DUVIVIER,—Attorney for the same.

—

Record No, 23,877.

16*th January* 1888.

By our Judgment dated 7th November 1887, it was decreed that Duvivier's land was entitled to one half of the water in St. Julien's Canal, and that the plaintiff who owns a portion of that land, was entitled to ask that the original agreement between Auger and Duvivier should be carried out.

But in as much as works had been erected which had resulted in a considerable increase in the volume of water flowing in the Canal, the Court ruled that the plaintiff would be bound to contribute one half of the expenses incurred by defendants for improving the Canal. The Court further ordered the inquiry to be re-opened for the purpose of ascertaining the extent of the works made to the Canal and their costs.

The evidence led in pursuance of the above judgment, revealed the fact that the Canal in masonry to the cost of which the plaintiff is to contribute one half, was almost entirely made whilst St Julien belonged to the Central Sugar Estates Company, that Estate having been purchased in September 1884, at the bar of the Master's Court, by the Oriental Bank Corporation in liquidation. The learned Counsel for the plaintiff argued that, whatever sum the plaintiff might be liable to pay for his contribution to the expenses incurred for building the Canal in masonry, that sum was due not to the defendants but to the Central Sugar Estates Company, by which the works had been carried out.

The learned Counsel argued that the claim made against his client for his share in the expenses incurred for improving the Canal was personal, and as such, did not, in the absence of any special agreement to that effect, pass on to the defendants, who as purchasers of the Estate " St. Julien ", were simply the " ayant cause particuliers " of the Central Sugar Estates Company. It was further urged that the claim of the defendants against the plaintiff was in the nature of an indemnity and that the works which gave rise to the indemnity having been performed by the predecessors of defendants, the indemnity being a personal claim was payable to them only.

The plaintiff's argument would be conclusive if the Court had to deal with the ordinary case of an indemnity due by a third party to the vendor of an immoveable property. One can easily understand that if, as a consequence of a partial eviction, or of damage done to one's property a right of indemnity has arisen, the vendor of that

immoveable property in the absence of any express stipulation may be held not to have transferred to the purchaser his right to indemnity at the same time as the Estate. His claim is not real but personal, and the purchaser, who as one must suppose, gives an inferior price for a property in some way or other lessened in value, cannot subsequently claim the indemnity which may be considered as representing the extent by which the value of the immoveable property has been diminished previous to the sale.

But it seems to the Court that the circumstances of the present case are widely different.

When the Estate "St. Julien" was purchased at the bar by the defendants in the month of September 1885, the whole of the water diverted from Mare Pondard came to the sugar house of St. Julien. As for the Canal in masonry which is the subject of the present inquiry by far the greater part of it had been already made.

There cannot be any doubt that it was included amongst the appurtenances of *St Julien* and that a higher purchase price was paid by the defendants than if the Canal had not been there or than if it had existed there only in its original and undeveloped state as in the days of Duvivier and Auger. We must now examine what were the rights of Duvivier or his successors under the original agreement between Duvivier and Auger. Auger's successors having built a masonary Canal, an event contemplated by the aforesaid agreement, it was within the option of Duvivier's successors (supposing the claim of *St Julien* to the exclusive enjoyment of the Canal was not admitted in a Court of law) to decide whether they would claim their full share of the water of the Canal on paying to the defendants as Auger's successors a certain sum equivalent to one half of the money spent in improving the Canal, or, as another alternative, to give up their right to water in case they did not think it expedient to contribute their share of the expenses so incurred.

In fact, under the circumstances above explained, the present owners of St. Julien practically bought in September 1884 the whole of the water flowing from Mare Pondard, together with the canal in masonry by which the water was led to St. Julien, subject to the right of the successor or successors of Duvivier to claim their rights to a share in the said waters. But if for the exercise of those rights which at the time of the sale had not been admitted, a sum of money has now to be paid, the Court must hold that it is payable to the defendants, who, together with the Estate St. Julien, bought the Canal, as one of its appurtenances and gave a consideration for it. It appears to the Court that the rights of parties should be reciprocal and that the agreement between Auger and Duvivier ought to bind their successors both actively and passively, "In the words of Demolombe des Contrats "Vol 1 § 288": Dès que la partie qui a "traité avec l'auteur de la transmission est "fondé à soutenir avec l'ayant cause "particulier qu'il a succédée à l'obligation "qui résulte du Contrat nous répondons "que l'ayant cause peut de son côté soutenir "contre cette partie qu'il a succédé corré-"lativement au droit qui en résulte."

In this instance, the plaintiff having summoned the defendants as Auger's successors, to carry out their agreement with him as Duvivier's successor, must be bound to fulfil with respect to the defendant, all the obligations resulting from that agreement. As to the costs of the works to which the plaintiff has to contribute, it has been variously estimated. The defendants have supplied a statement of expenditure from which it appears that the Canal in masonry cost the Estate "St. Julien Rs 12991.77 c. but, owing to the difficulty of proving cer-

tain items of expenditure after an interval of five years, when it was not contemplated at the time that they would have to be fully justified in a Court of law, the defendant's evidence as to the actual cost of the Canal is unsatisfactory on certain points. The Court has, as a consequence, to rely on the estimate of the works by experts. Amongst these, Mr. Chaumon, called by plaintiff, has, in the opinion of the Court, given much too low a figure. Mr. Lepervenche who possesses experience in works of the same nature and Mr. Montocchio, the Manager of a neighbouring Estate, have estimated the costs of the canal at one rupee and thirty cents and one Rupee and six cents respectively per foot, there being 11,042 feet of masonry work, the Court is inclined to hold that, Rs 11,000 may, in round numbers, be considered as a fair estimate of the costs of the Canal.

Another questi on was raised, though not much pressed by plaintiff. His Counsel represented to the Court that the canal was too large for the volume of water usually flowing in it, and as a consequence that the expenditure for the Canal's reconstruction so far as he was concerned, had been needlessly high. But it would have been unfair, in the opinion of the Court, to limit the defendants, when building the Canal, to the flow of water in ordinary seasons and it seems reasonable that allowance should have been made for the occasions when, on account of heavy rains, the volume of water in the Canal might be much larger than ordinarily.

Plaintiff will have therefore to pay to defendants the sum of Rs. 5500 before he can call upon defendants to send half of the water of the Canal to Duvivier's land.

As for damages, the plaintiff has proved none—The plaintiff is entitled to his costs up to the 7th November 1887, date of the Judgment of the Court which led to the present inquiry—But in all the proceedings subsequent to that Judgment, the defendants will recover from the plaintiff half their Costs.

SUPREME COURT

POLICY OF INSURANCE—TOTAL LOSS—ACTION AGAINST INSURERS—NO SERIOUS OR ADEQUATE EFFORTS BEFORE ABANDONMENT — INSURERS NOT COMMUNICATED WITH IN TIME—VERDICT FOR DEFENDANTS—COSTS.

The Plaintiff having brought an action on a Policy of Insurance against total loss of a schooner, the underwriters resisted the same on the ground that the plantiff or his agents had not done all that lay in their power for the preservation of the ship before abandoning her as a total loss, and had not acted with due regard to the insurers' interests.

The Court held:

1o. *That, the attempt made by the captain for local tenders had not been seriously or adequately made.*

2o. *That an abandonment is not justifiable till all reasonable efforts have been made to save the ship; and such efforts had not been made in the present case.*

3o. *That it was incumbent upon the captain, who by abandoning the ship had become the agent of the insurers, to communicate in time to the latter the conclusions arrived at by him, so that they should take steps to protect their interests.*

Adopting the view of the Court of Common Pleas in the Re: Kaltembach v. Mackenzie, the Court found a verdict for defendant, with costs.

RAFFAUT,—Plaintiff

and

THE MAURITIAN MARINE INSURANCE COMPANY.

—

Before

His Honor A. MURE,—Puisne Judge.

His Honor F. C. WILLIAMS,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

I. JOLLIVET,—Counsel for plaintiff
E. LEBLANC,—Attorney for the same.

P. L. CHASTELLIER,—Counsel for defendants
J. BOUCHET,—Attorney for the same.

—

Record No. 23662.

24th January 1888.

This action is brought on a policy of insurance against total loss of the schooner *Jane Bell*, which after being driven on to a reef at Port Mathurin, Rodrigues, during the hurricane of April 15 1886, was subsequently abandoned by her Captain, acting under the owner's instructions. as a total loss, was sold by the Civil Commissioner of the Island at the Captain's request without previous notice to the insurer, and was bought and broken up by the plaintiff's son, assisted in his venture, at all events after, if not before, the actual sale and purchase, by the plaintiff himself, who now claims the total value of his policy.

It is not contended by the defendants that the stranding of the *Jane Bell* was due to any carelessness or neglect on the part of the Captain or crew. The points at issue are whether, after the insured vessel was driven on the reef, the plaintiff or his agents did all that lay in their power for her preservation before abandoning her as a total loss; and whether they acted with that due regard for the insurer's interest which the law expects from them, so soon as the vessel was abandoned.

When the *Jane Bell* was discovered to be stranded, a commission was duly and officially appointed to report upon her condition Although the examination does not appear to have been exhaustive, the three members of the commission agreed that the vessel was susceptible of repair, and that, once floated, she might be taken to Mauritius (an average voyage of three days) in ballast with a double crew. Rodrigues is, of course, short of appliances such as a slips or dry docks, for completely rehabilitating a damaged vessel; but it seems to us that the question, after the report of the commission, was one of at least attempting to patch this vessel up by local workmanship so as to float her and enable her to get to Mauritius. We are unable, in the bare fact that the captain advertized for local tenders for the repairs, and received none, to find evidence that this attempt was seriously or adequately made. The tenders were suject to what several witnesses describe as a prohibitory condition as to security. It does not seem to us that even sufficient time was allowed for any serious tenders being made. The advertisement was published on the 24th April, some time during the day, and the tenders were required to be sent in before 12 o'clock on the 26th. The terms of the call for tenders were indefinite and contained no specification of the damage done, or to be repaired. It is not to be wondered at, if no result was come to. But, though there were no tenders, it seems certain that competent workmen might have been engaged at Rodrigues as day laborers to effect such repairs as the members of the commission of inspection thought necessary, and, meanwhile, the insurers in Mauritius might have been communicated with. But nothing of the sort was done.

No effort was made even to lighten the ship with a view to floating her or to ascertaining the exact measure of the damage which she had sustained. In the bare fact that no response was made to the advertisement for tenders, the captain, acting under the owner's immediate authority, seems to have considered that he found sufficient justification for an application made, a few days later, to the local authority to sell the ship, as abandoned and a total loss.

We must also observe that the damage to the ship was by no means so serious as the plaintiff now describes it. According to the report of the surveyors, the ship was full of water at full tide, but at low tide there were four feet and a half of water in the hold. This is one of the facts on which Messrs. Cowin, Perrin and the other experts called by the defendants founded their opinion that the ship could be floated again without any undue difficulty or expense, as it showed that the damage to the ship was done at a height of 4½ feet from the bottom. The general facts found by the surveyors were not at first denied by the captain. Nay more, in his *procès verbal* made soon after the wreck, we find that he himself mentions the fact that there were 4 feet 10 inches of water in the hold of the ship at low tide, whilst, strange to say, his witnesses now come forward to state that the ship emptied itself completely.

Upon careful and mature consideration of all the evidence, we do not think the course of action of selling the ship as abandoned and a total loss is one which the plaintiff would have adopted in respect to his vessel, had he been without the protection of an insurance policy. The abandonment was not justifiable till all reasonable efforts had been made to save the ship. And no effort had been made except such as consisted in putting an announcement on a notice board. But. the abandonment having been decided upon, and the captain having arrived at the conclusion that any practical attempt on his part to repair and refloat the ship would be superflous and futile, it was at least incumbent upon him in law to communicate this conclusion to the defendants as insurers, whose agent he then became, and to give them the opportunity of doing or trying to do, what he himself thought it useless to attempt, and so possibly to avoid the loss involved in a forced sale, undertaken in so small and remote a community as Rodrigues. We approve of the law laid down in the Court of Appeal in the important case of Kaltemback v. Mackenzie, June 1st, 1878, L. R. Vol. 3rd, Common Pleas Division, p. 467, in which the Court stated, "The law "that has been laid down, is, that immediate- "ly the assured has reliable information of "such damage to the subject matter of insu- "rance, as there is imminent danger of its "becoming a total loss, then he must at once, "unless there be some reason to the con- "trary, give notice of abandonment."

Again in the same case Lord Justice Brett says "I will not say that if it could be "shown that the subject matter was in such "a condition that it would disappear before "notice of abandonment could be given, "the assured might not be excused from giv- "ing notice, but I say that nothing short of "that would excuse him." It does not appear, upon the evidence, that the ship having been abandoned, there was any pressing necessity for sale. The hurricane season was just over,—the danger of a "ras-de-marée" appears to have been but a very remote contingency; and, within a month, at all events, the insurers might have been put by ordinary means in possession of all the facts of the case, and in a position to act as they chose in the protection of their interests,—while as to the ship, in the absence of hurricanes or "ras-de-marée," she might have remained no further injured

than she was, according to the opinion of some of the witnesses, for an almost indefinite period. But an immediate sale was urged upon the Civil Commissioner by the captain, and the Civil Commissioner yielded to his demand. The sale took place, with the result, as we have said, that a natural son of the plaintiff, a workman without apparently any independent means of his own, was declared the purchaser. And the purchaser, with the active assistance of the plaintiff, was actually engaged in breaking up the vessel at the time that news of its abandonment reached the defendants in Port Louis.

We are of opinion that the plaintiff, insured only against total loss, did not employ adequate measures or take even such means as were to his hand for the preservation of this vessel before abandoning her. And we further find that there was no sufficient notice of abandonment such as the law prescribes, to the underwriters, the notice actually given being subsequent to the premature sale and disposal of the vessel.

Our verdict is for the defendants, with costs.

SUPREME COURT

—

DEED OF PARTITION—INTEREST OF CREDITOR—PARTIAL HOMOLOGATION—SILENCE OF CODES—UNDISPUTED COLLOCATIONS—DISTRIBUTION BY WAY OF ORDRE—POWER OF COURT TO ORDER PAYMENT OF UNDISPUTED COLLOCATIONS.

Pending discussions among certain heirs and legatees, two parties moved that a deed of partition should be homologated in so far as their undisputed collocations were concerned.

The motion was opposed by a debtor :

1o. Because he would then have to pay part of a debt which it was his interest to discharge in a lump sum.

2o. Because he was bound to pay only according to a final partition and our Codes do no speak of a partial homologation.

The Court considered :

That the first argument was one of expediency only which could not prevent the exercise of the rights of the creditors whose collocations were undisputed and who could give a valid discharge.

That although the Codes are silent with respect to partial homologation yet there are cases in which the Court may, as in matters of distribution by Ordre, homologate partitions in so far as undisputed collocations are concerned.

Motion granted.

—

MICHEL,—Plaintiff

and

PILOT and others,—Defendants.

—

Before

His Honor Sir E. J. LECLÉZIO KT.,—Chief Judge.

and

His Honor F. C. WILLIAMS,—Puisne Judge.

—

P. L. CHASTELLIER,—Counsel for plaintiff.
GANACHAUD,—Attorney for the same.

V. DELAFAYE, W. NEWTON, G. GUIBERT and H. GALÉA,—Counsel for defendants.

V. BOULLÉ, H. LECLÉZIO, E. SAUZIER, and F. ROBERT,—Attorney for defendants.

—

Record No. 24,127.

24th. January 1888.

In this matter which is an action for the homologation of a deed of partition of the succession of Widow Petit, Mr. Chastellier for Joseph Buttié and Mr. Delafaye for Widow Barry dative guardian of her minor grand children, moved that, pending the

discussions among the heirs and legatees Petit, the deed of partition be homologated in so far as the Collocations of their clients are concerned inasmuch as no objection had been raised against them.

These motions were objected to by Mr. Guibert for the Compagnie Sucrière de Queen Victoria et "Bonne Mère" 1o. on the ground that the effect of the Order of the Court would be that his clients, against whom the collocations Buttié and Barry were made, would have to pay part only of the sum which is due by them, whilst their practical interest, on account of the many arrangements made by them, was to pay the whole price they owed and 2o. that in law they have to pay their price according to a partition which must be final, and neither the Civil Code nor the Code of Civil procedure spoke of the partial homologation of a deed of partition.

There may be cases in which the Court should not order partial homologating, but we are of opinion that in this case the reasons given by the objecting parties are not sufficient to prevent us granting the motion made —After reading carefully the voluminous deed of partition now before the Court, we have found nothing in the points raised by some of the heirs Petit affecting the rights of Buttié and Barry. They can give a valid discharge to the Compagnie Sucrière de "Queen Victoria and Bonne Mère". We therefore think that they are entitled to be paid now and cannot be made to wait until the points in issue among the heirs with which they have nothing to do are settled by a judgment of this Court. We cannot sustain the plea taken by the purchasers of widow Petit's share in "Queen Victoria and Bonne Mère" that they have made arrangements to pay the whole amount due by them in a lump sum, this is an argument of expediency which cannot legally stop the exercise of the rights of the creditors of widow Petit, and although the Codes do not speak of partial homologation, we think that there are cases in which the Court may, as in matters of distribution by way of 'Ordre', homologate partitions in so far as certain undisputed collocations are concerned.

The motions are granted.

SUPREME COURT

ACTION IN DAMAGES—FAUTE—NÉGLIGENCE—AMENDMENT—POWER OF COURT—ART. 73 RULES OF COURT—MAIN QUESTION THE SAME IN BOTH FORMS—AMENDMENT ALLOWED—SUPREME COURT RETAINS CASE—COSTS.

The plaintiff who had claimed damages for the total loss of two lighters through the alleged negligence and "faute" of the defendant, moved for leave to amend his summons by stating therein that the lighters had only been damaged, and by reducing the quantum claimed.

The defendant objected to the amendment.

Upon a reference from the Judge at Chambers, the Court held:

1o. *That the principal question in this case was whether the defendant had been or not been guilty of "négligence et faute", and that that question remained in exactly the same position under both forms of this declaration.*

2o. *That the clause in Art. 73 which gives to any Judge of the Supreme Court the power of amending all defects and errors in any proceedings etc., "whether the defect or "error be that of the party or not," with or without costs, seems to have contemplated a state of matters like the present one.*

3o. *That this case should be retained by the Supreme Court, although the amount now claimed made it cognizable by the District Court also, the Supreme Court having jurisdiction in all civil cases and there being no form of procedure known for referring a case by the Supreme Court to an inferior Court, under such circumstances.*

The majority of the Judges were of opinion that the plaintiff should bear the costs of the amendment, although it was through the objection of the defendant that the question of the power to amend in this case had been raised and argued in Court.

—

THE CENTRAL DOCK COMPANY,—Plaintiff.

and

LOGAN,—Defendant.

—

Before

His Honor A. MURE,—Puisne Judge.

His Honor F. C. WILLIAMS,—Puisne Judge

and

His Honor J. ROUILLARD,—Puisne Judge.

—

W. NEWTON,—Counsel for plaintiff
E. SAUZIER,—Attorney for the same.

V. DELAFAYE,—Counsel for defendant
F. Robert,—Attorney for the same

—

Record No. 24,211

7th February 1888.

His Honor MR JUSTICE MURE.

This is a motion made to amend the declaration in this case.

The procedure for the amendment began before the judge in Chambers, who after hearing the parties, referred the matter to the Court and we have had a discussion today which has raised the whole question of the meaning of article 73 of the rules of procedure of this Court. That article is to this effect : " The Court and every Judge " thereof shall have at all times the power " of amending all defects and errors in any " proceedings in Civil causes, whether " there is anything in writing to amend " by or not and whether the defect or error " be that of the party or not ; and all such " amendments may be made with or without " costs as to the Court or Judge may seem " fit, and all such amendments as may be " necessary for the purpose of determing (in " the existing suit) the real question in con- " troversy between the parties shall be " made."

Now upon this rule of Court there have already been various decisions pronounced. Perhaps the arguments to-day raise a new question under this rule, because we have to consider this point, whether a change of circumstances which has supervened since the declaration was issued is one of those defects and errors which are within the purview of this rule of Court; and in solving that question it seems important to keep in view a single clause of this 73rd article, namely " whether the defect or error be " that of the party or not " It seems to have contemplated therefore even such a state of matters as that to which I have alluded.

The facts of this case are these : The *matériel du batelage*, among which were two lighters belonging to the Central Dock Company, were let by that Company to the New Mauritius Dock Company. The New Mauritius Dock Company were employed to load and unload a ship in the harbour called the " Bellona " which capsized and overwhelmed these two lighters and sank them. That allegation was made in the plaintiff's summons and a sum was concluded for as if for their total loss ; but of course if it had been a mere accidental event—a fortuitous circumstance—there might have been no responsibility; and the legal responsibility which is sought to be made out against the defendant is that this capsizing of the ship took place through his fault and negligence and imprudence : The lighters were finally not lost. They were raised again and certain damage having been supposed to be done to them they have been surveyed and that damage is estimated at some Rs. 750

and the plaintiffs propose to change their declaration in such a way as that while the fault and negligence and imprudence remain the same, they shall be entitled to recover for the damage done to the lighters only and not for their total loss.

The question is whether the matter in controversy between the parties has been changed or not, and whether though some of the averments and the amount concluded for be changed, we shall determine the real question in controversy between the parties in the existing suit. Now we cannot but feel here that the important question for the defendant is whether it was through his fault and negligence that this accident occurred and that under both forms of the declaration, that is the principal question. It is said that he will be greatly prejudiced by the amendment now proposed, but assuredly the important matter for him is his legal responsibility, or fault. or innocence,—and that remains under both forms of this declaration in exactly the same position. Then again the sole question is whether a smaller amount of damage will make the amendment which is sought for incompetent.

The Court having given its best consideration to this matter thinks that such an amendment —if this clause of the rules of Court is to be available at all to parties—should certainly, be allowed, and that it comes within the purview of the rule. The defendant will simply have to answer for a smaller sum than originally sought for and for a less degree of injury—and there will not be in reality any change of the ground of action. The serious matter which is at the bottom of both forms of the declaration is the *faute*—as it is called in the french code —of the defendant, and that matter remaining the same, we think the amendment may be allowed.

The question remains under what terms and conditions this ought to be done.

Now we have considered this matter carefully and the majority of the Court are of opinion that the party who launches a declaration ought to know his case sufficiently before he does so and that if he has to make an amendment in the course of the action to the declaration that there is a kind of penalty which ought to be put upon him for the change which he proposes. The question is not to be viewed merely as one in which the plaintiff has succeeded in the litigation of this day, for the rule of Court under which we are acting, permits the amendment to be made but puts its in the discretion of the Court to affix such conditions of Costs as they may think the circumstance of each case may require, Further, as the plaintiff went with a summons before the Judge in Chambers who referred the matter to the Court (I believe with the consent of all parties) I consider that we are really doing the work which the Judge in Chambers might have done, or could have done if he had chosen to exercise his judicial discretion; but I wish to add that in exercising his discretion in the way he did, I think he did wisely. There is no doubt that if this matter had terminated in Chambers the proceedings would have been very properly had at the expense of the plaintiff seeking the amendment, and we think that that rule should prevail here.

We shall therefore, find the plaintiff entitled to make the amendment proposed but liable in the costs of the summons, of the amendment and the costs of the discussion to-day.

We should mention, perhaps, that the case must continue in this Court. We have no doubt with regard to the jurisdiction of the Court and we cannot assent to the idea that there should be any reference from this Court to an inferior Court. There is no such form of procedure.

His Honor Mr. Justice Rouillard :

As my brother Judge has already remarked I entirely concur in the judgment of the Court, which is to the effect that the amendment should be allowed, and I also entirely concur in the reasons which have been given by Mr. Justice Mure. On one point only I differ from my brother judges. The point has not much importance, the judgment as pronounced remaining the judgment of the Court ; but as in my opinion the plaintiffs ought not to bear the costs of the discussion of to-day, it is better that I should say on what grounds I have come to that opinion.

I may in a few words explain the view I have taken on this occasion. Had the matter stopped before the judge in Chambers, as the incident was one entirely of the plaintiffs' making, I should certainly have acquiesced in a judgment ordering that all the costs incurred before the Judge in Chambers be borne by the plaintiffs ; but I can not lose sight of the fact that if the matter has come before us to-day and if we have had this discussion, it is on account of the strong objection which the defendant has raised against the amendment. Had the Judge in Chambers given his judgment in favor of the amendment, had then an appeal been made to this Court, and had the discussion of the day taken place on the appeal, I believe that the defendant would have been made to pay either the whole or, at all events, a portion of the costs. The case has taken a different shape—it has taken the shape of a reference from Chambers—but if there has been a reference from Chambers, it is because the defendant raised an objection against the application for an amendment, which objection has ended in the present proceedings. At the same time, I think there are special circumstances in this case and in my own mind each party ought to pay the costs of the present discussion. As I have said before, the matter is only a question of costs, but I think the rule is that, when a judge dissents from the opinion expressed by the majority of the Court his reasons should always be given.

SUPREME COURT

—

Lodgings for servants—Sugar Estate—Employer—Laborers residing in private huts — Mutual agreement—Appeal—Art. 223 Labour Law—Arts. 184 and 185—Object of these articles—Decision reversed.

A sugar estate owner was charged under art. 223 of the Labour Law with having failed to provide his laborers with lodgings.

The evidence established that by mutual agreement, the laborers resided in huts built by certain sirdars both on lands of the Estate and on other lands, and that the laborers paid a merely nominal rent.

The Magistrate dismissed the summons.

On appeal, the Supreme Court held :

1o. *That in virtue of the above art.* 223, *the employer is imperatively bound to provide his laborers with lodgings.*

2o. *That a perusal of that article and of the other articles in the same chapter, clearly shows that the economy of the law was to enact sanitary regulations for the dwellings of Indians who work on estates.*

3o. *That the system which obtained on the estate in question constituted an evasion of the said Sanitary regulations.*

4o. *That articles* 184 *and* 185 *of the Labour Law contemplate only cases of an exceptional nature.*

Decision of the Magistrate reversed.

—

The QUEEN,—Plaintiff

and

THE ACTING STIPENDIARY MAGISTRATE OF PAMPLEMOUSSES and H. DARNEY & Co.,—Defendants.

—

Before

His Honor Sir E. J. Leclézio,—Chief Judge

and

His Honor Andrew Mure,—Puisne Judge

—

Hble. L. Rouillard,—Counsel for plaintiff
J. Guibert,—Attorney for the same.

V. K/Vern,—Counsel for defendants.

—

Record No. 24,246.

17*th February* 1888.

His Honor, The Chief Judge:

The record in this case was brought before us at the request of the Procureur General with the view of having the decision of the Stipendiary Magistrate quashed by the Court.

The facts of case are given in the Judgment of the learned Magistrate, who has summed up in this way:

" As this case may be brought before the " Supreme Court by way of Certiorari, it " may perhaps prove useful that I should " give the grounds of my judgment in the " matter. The accused are charged under " Art. 223 of the labor law " with having on " or about the 5th of September last failed " to provide the servants of the Estate, not " being household servants, employed by " them in the said Estate with sufficient and " wholesome lodgings, according to the " usage of the Colony. The facts established " by the evidence have, so to say, been admitted by the accused who did not call " witnesses. Those facts may be summed " up as follows: Before the men engaged with the Estates it was agreed that " they should reside in their own huts, those " huts were built at different places partly " on land not belonging to the Estate and " partly on land belonging to the Estate " and leased to three Sirdars. As will be " seen the men paid a rent of 5, 6 or " 7 cents of a rupee for each hut and for " the piece of land adjoining; they preferred " this to inhabiting the Estate Camp.

" The Counsel for the defence argued " that as there was nothing in the law or " the regulations to compel the laborers on " an Estate to live in the camp, there was " no necessity for a planter to build a camp " if it was to remain unoccupied. The men " were free to reside where they chose (in- " ference drawn from the last words of art. " 184 of the labor law). In this case it is " clear that the men do not wish to reside " in the camp, there is therefore no necessity " for the accused to build a camp. For I " cannot conceive that it should have been " the view of the Legislation to order that " a camp should be put up if it were to be " kept shut. Now it is true that under art. " 230 of the law, the Protector can lodge a " plaint whether a servant has complained " or not, which is the case here. But what " would be the result of fining the accused " for having omitted to erect a camp? That " they should have one built at once? But for " what purpose, if the indians refuse to live " in it? This clearly shows that if the ex- " orbitant power given to the Protector to " enter complaints, even when the servant does " not complain is productive of good in some " cases, it proves in this particular case to " give negative results. Matters such as " they stand cannot be altered unless the " indians claim a camp.

" This however does not take away from " the indians, the right under their contract, " to claim at any moment proper lodgings " according to the usage of the Colony. This

" right may be put forward either by the " indians themselves or by the Protector of " Immigrants and in such a case it will be " the duty of the Stipendiary Magistrate to " order the planter to build wholesome and " sufficient lodgings for the laborers within " a fixed period, and he may require the em- " ployer to pay the servant an allowance " of 12 cents per diem from the date of the " order until the servant be properly " lodged. This may be inferred from " the fact that when the dwellings are " insufficient, unhealthy, or not in con- " formity with the regulations, there is not, " at first an offence. The remedy is simply " that a certain delay be given to the planter " to fill up the deficiencies during which the " servant receives an indemnity. It is only " in case the Magistrate's order be not " complied with that there arises an offence " by omission which is punishable by a fine " under the general penal clause. In like " manner, I am strongly of opinion that " there is no necessity, at first, for a Camp, " if that Camp is not to be used, from the " fact that the servants refuse to live in it. " But if the laborers claim lodgings then the " only logical and equitable decision to " which a Magistrate may come, is to grant " the planter a reasonable delay to build a " Camp, giving in the interval to the servants " an allowance of twelve cents of a rupee " per diem. It is only after that delay has " elapsed and the Camp has not been built, " that the contravention exists and the " person can be fined. For these reasons " I have come to the conclusions that the " defendants could not be fined inasmuch " as the indians refuse to use the Camp and " therefore the result of my sentence would " be the erection on the Estate of a camp " which would remain unoccupied. I there- " fore dismiss this plaint with costs."

I have read the whole of the Judgment of the learned Magistrate because it shows that he has examined the case with great care and he has come to the conclusion that the moment the indians had agreed with the owner of the Estate that they should not reside on the Estate itself, -- in a camp established by the owner of the Estate—that there was no contravention and that the protector could not intervene and lodge a complaint when the indians themselves did not complain.

I am sorry to say that the Court disagrees entirely with the views taken of the law by the learned Magistrate. We are in presence of a very clear, positive and imperative enactment,—Article 223 of Ordinance 12 of 1878, which is our Labor Law This article says that when a person employs servants upon a Estate, he " shall provide " them with sufficient and wholesome lod- " gings according to the usage of the Colony."

There is nothing said in this article about servants who do not reside on the Estate. The first thing that the owner of an estate must do according to this article, is to provide for the servants who are engaged to work on the Estate sufficient and wholesome lodgings.

This article is followed by several other articles which provide for the way in which the camp is to be established—the dwellings are to be numbered, and penalties are enacted for non compliance with the law — the camps are to be inspected, and there are to be enclosures for animals, which are not to be kept within the precincts of the camp itself. Now it is clear that the general economy of this chapter of the law is to enact sanitary regulations for the dwellings of Indians who work on Estates, and if the owner of an estate is allowed to make arrangements such as those which have been made in this particular case — that is to say, to lease part of the land of the Estate itself to sirdars to procure houses for the men of the Estate and to allow those sirdars to use the timber of the Estate for building

huts on that piece of land and the thatch of the Estate for covering those huts and to sublet those huts and the adjoining land to the laborers of the Estate for a mere nominal price—5 or 6 cents of a rupee per month—it is clear that that would be a positive evasion of the enactments contained in chapter 13 which provides for sanitary regulations concerning camp on Estates.

There is an argument which has been used before the Magistrate and which has been repeated to us here, by the learned Counsel who appeared for the owners of the Estate, which was certainly worthy of our consideration, and we have examined it with great care. The argument is derived from article 184 of the same Ordinance and the articles which follow article 184 says: "Every contract of service, written or verbal, shall, "notwithstanding anything to the contrary "therein, impart an obligation on the part "of the employer to provide medical care at "his expense for the servant, if the servant "reside on the premises of the employer," and article 185 says: "Every person who "shall have in his employment and residing "on his premises, under written contract of "service, 20 or more servants, shall require "to have, for the accomodation and treatment of such servants in case of sickness, "an hospital in accordance with the provisions of this Ordinance."

Now, in the first place, these articles are contained in a chapter which is different from the one which contains that positive, clear and imperative enactment of article 223, which is Chapter 13 of Ordinance 12 of 1878 — but we do not think after having examined carefully the article concerning the medical care and treatment to be given to the servants employed on an estate, that the legislature ever contemplated that all the men engaged on an estate would reside out of it. I think, for my own part, that the legislature there contemplated, as an exception, the case in which certain of the servants may not reside on the Estate. But we hold that article 223 is independant of articles 184 and 185 and should not be read with them and we are very clearly of opinion that that article has imposed an obligation on the owners of the estates, who engage men to work upon their estates. There is no distinction made by that article between the servants who reside and those who do not reside on the premises—to have proper dwellings, according to the usage of the Colony, provided for those servants. We must, therefore, come to the conclusion that the law here is so imperative that it is not possible by means of agreements made previous to engagement, such as the agreement which has been laid before the Court in this particular case, to evade this provision of the law. We have not in this case to give an opinion as to the right of the protector to compel the men once engaged to reside in the camp, or in the dwellings which must be provided according to this chapter of the Ordinance. We have merely to give our opinion upon the obligation which is imposed on the owner of an estate to provide those dwellings.—The other question we have not to decide to-day as it was not in issue before the Court below. We therefore think that the Magistrate having mistaken the views of the Legislature upon this point, his decision must be quashed and the record must be referred back to him in order that he should deal with it in accordance with the views expressed by the Court.

SUPREME COURT

APPEAL FROM CONVICTION—INLAND REVENUE GUARD — INLAND REVENUE SUPERINTENDENT —HIS RIGHT TO PROSECUTE UNDER PENAL CODE—ORD. 6 of 1878—ORD. 29 of 1853—ORD. 11 of 1860—CONVICTION QUASHED.

A prosecution having been instituted under Art. 126 Penal Code, by the Superintendent of Inland Revenue against a guard of his department, a conviction ensued.

The Supreme Court, on appeal, held:

1o. *That by our Law the privilege of prosecutions under the Penal Code belongs (a) to the party injured himself;* (b) *to the Procureur General (Ord. 29 of 1853);* (c) *to the Police (Ord. 11 of 1860).*

2o. *That the Superintendent of Inland Revenue has now no separate and independent title as an Inspector of Police, but formerly had one merely accessory to an appointment which has since been recalled (Ord. 6 of 1878).*

3o. *That, consequently, the Inland Revenue Superintendent had no right in this matter to appear in Court as an Inspector of Police and prosecute under the Penal Code.*

Conviction quashed.

MONTY,—Appellant

and

QUEEN,—Respondent.

Before

His Honor Sir E. J. LECLÉZIO,—Chief Judge.

and

His Honor A. MURE,—Puisne Judge.

O. LAURENT,—Counsel for Appellant.

THE HON. L. ROUILLARD, SUBSTITUTE PROCUREUR GENERAL,—Counsel for Respondent.

E PITCHEN,—Attorney for Appellant.

J. GUIBERT,—Attorney for Respondent.

Record No. 546.

17*th February* 1888.

His Honor Mr. JUSTICE MURE.

This is an appeal from a judgment of the District Magistrate of Port Louis in a case brought at the instance of Mr Seïd du Vergé, Superintendent of Inland Revenue, against a man of the name of Monty, who was an Inland Revenue guard. He was believed to have accepted a bribe from a chinaman not to prosecute him for a contravention of the weights and measures Ordinance, and Mr. du Vergé proceeded to prosecute him for accepting a bribe of Rs 12. The Magistrate has found Monty guilty and has sentenced him to six months' imprisonment.

The information against Monty is taken under the Penal Code of the Colony, section 126, second paragraph, in which it is said: "The present provision is applicable to any "functionary, agent, or servant of the des- "cription above mentioned who by an offer "or promise accepted, or by any gift or "reward received, shall abstain from doing "any act which belonged to the discharge "of his duty." The punishment applicable to this offence is reclusion and condemnation to a fine of double the value of the promise accepted or thing received, without however such fine being less than £10.

We have had various questions argued before us in this appeal, but there was one especially argued, upon which we think the case may be decided and I shall consider it and it only. When the charge of bribery was heard before the Magistrate, the objection was taken *in limine* to Mr. du Vergé acting as prosecutor under the Penal Code. The objection was overruled by the Magistrate and an entry is made in the record that the following words contain the ground

of the Magistrate's judgment "Mr. du "Vergé being to the knowledge of the Court "an Inspector of Police."

This objection has been again carefully pleaded to us and the Crown has produced the whole of the documents in its possession under which it is maintained that Mr. du Vergé has the right to prosecute as Inspector of Police. It appears that on the 30th October 1876, a letter was addressed to Mr. du Vergé by the Assistant Colonial Secretary to this effect, "Sir, I am directed by the "Governor to inform you that His Excel- "lency has been pleased to appoint you to "be the Inland Revenue Superintendent. "Your appointment will date from the 1st "proximo and I am to request that you "will place yourself in communication with "the Inspector General of Police who has "been authorized to cause you to be sworn "in as a special Police Inspector. You will "likewise be good enough to present your- "self before a District Magistrate with a "view to your being sworn in as Inspector "of Distilleries and Inspecter of Licenses." On the same day, Mr. du Vergé presented himself before a Judge in Chambers and took his oath as special Inspector of Police, and we find that in Government Notices of 1876 those two facts were recorded, the appointment and the oath of this gentleman are in the following terms: on the 31st of October 1876 in number 119: "His "Excellency the Governor directs it to be "notified for general information that he "has been pleased to make the following "nominations to take effect from the 1st "instant, to wit: To be Superintendent of "Inland Revenue, Mr. L. S. R. du Vergé"; and then follow a number of Inspectors of Inland Revenue and Inland Revenue guards and their names and it is added: "All these "appointments to be on probation till fur- "ther notice." Then on the 24th of November 1876 in Government notice No. 134 of that year, it is said: "Notice is hereby "given for general information that the "following officers, to wit: L. S. R. du "Vergé Superintendent of Inland Revenue "and 5 Inland Revenue Inspectors have "been sworn in and are empowered to act "as Inspectors of Licenses, Inspectors of "Distilleries and Inspectors of Police." It is right to add that in the oath book of the Court, which was produced to us also, it appears that Mr. du Vergé was sworn in as a special Inspector of Police. This was followed by Ordinance No. 6 of 1878, which, for the first time, apparently, endeavoured to consolidate the laws of the Inland Revenue and to make more effectual provision for administering these laws. I may observe that, notwithstanding a very diligent search, I have not found any trace of any Ordinance under which the Governor was authorized to make any appointment of a Superintendent of Inland Revenue, prior to this Ordinance. The Governor by various Ordinances is authorized to appoint Inspectors of Distilleries and Inspector of Licenses: but, so far as I have been able to trace, I do not find that there was any authority given to the Governor by any Ordinance to appoint a Superintendent of Inland Revenue; and I presume that the note in the first Government Notice which I read—that these appointments were made on probation—is the explanation of the fact I now mention. I mention this incidentally—the judgment of the Court is not to be founded in any respect on that fact—but I may say I notice that Ordinance 27 of 1845, Ordinance 29 of 1852 and Ordinance 27 of 1853, section 32, contain authority to the Governor to appoint Inspectors of various kinds of Inland Revenue, but they do not go further. However, by Ordinance 6 of 1878, by the 13th section, it is enacted that "the Governor shall have "power to appoint a Superintendent of In- "land Revenue, and as many Inspectors,

"sub-Inspectors and Guards, as may appear "to His Excellency to be necessary."

"By the 18th section it is provided: sub- "ject to regulations to be framed under "this Ordinance and to the instructions of "the Receiver General, the officer and "guards of Inland Revenue shall exercise "such supervision over licensed traders and "others as will be necessary to protect the "public revenue and hinder the perpetration "of fraud in matters regulated by the fol- "lowing laws"; and there are ten sub-sections to this article one of which is the "laws regulating weights and measures." Then, by the 19th section it is said: "In all "matters regulated by the laws mentioned "in the last preceding article the superin- "tendent and Inspectors of Inland Revenue "shall have all the powers conferred by the "laws hitherto in force on Inspectors of "Police, Inspectors of Distilleries and Ins- "pectors of Licences"; and this is followed by various regulations in reference to this article. In the first place there are penalties for obstructing Inland Revenue Officers and guards, then there is a penalty on persons giving bribes to officers and guards, and then we have the 24th section in which it is said: "No officer, or guard of Inland "Revenue shall take or receive from any "person any gratuity, fee, or reward of any "kind for the performance or omission of "any act in the performance of his duty, "other than the pay attached to his office, "the allowances or rewards granted to him "by the Government and the shares by law "accruing to him in any penalty, fine or "seizure pronounced by any Court of law. "Any officer or guard contravening this "provision shall be liable to dismissal from "office without prejudice to any penalty to "which he may be subject under Ord. No 6 "of 1838 commonly called the Penal Code "of the Colony"— and there is also the 25th section which says: "any officer or "guard of Inland Revenue convicted of "having connived at, or permitted, or hav- "ing knowingly been concerned in, any act "involving a contravention of this or any "other law relating to Inland Revenue, "shall be subject to imprisonment for a "period not exceeding six months besides "the forfeiture of any bond subscribed by "him, without prejudice to any prosecution "to which he may be liable under Ordin- "ance No. 6 of 1838."

I think that I have stated the whole of the ordinances and the Government notices which bear on this question, and I have now to consider the right of this gentleman to prosecute as a public prosecutor under the Penal Code.

In the first place, in this matter, our custom and the custom of all modern civilised nations has departed from the Roman system of law, which invited any citizen to prosecute for any offence which was injurious to the public interest. With a wiser and what I will call a more salutary policy, and one which is more suitable to our state of society, our law has confided the important privilege of prosecution to different descriptions of persons. In the first place there in the party injured by any offence, who under certain conditions is entitled to prosecute. In the second place, there is the Procureur General who under the Ordiance 29 of 1853 by himself and his deputes, can prosecute in any court, and third, there is the Police, who, under Ordinance 11 of 1860, the 21st section, paragraph 10 thereof, are entitled to do so; in fact the duty is imposed on them of swearing informations and conducting prosecutions.

Now these are the classes of persons who have the right to appear as prosecutors in our Courts, and if Mr. du Vergé had held a separate and independent commission as Inspector of Police he would undoubtedly have had a perfect right to prosecute under

the Penal Code. But, taking all that we see of his appointment in the letter of the 30th October 1876, as specially connected with the Police, he is simply to place himself in communication with the Inspector General of Police, who has been authorized to cause him to be sworn in as a special Police Inspector; —and that is in a letter which appoints him to be the Inland Revenue Superintendent and is followed by another clause asking him to present himself to be sworn in with reference to his offices of Inspector of Distilleries and Inspector of Licenses.

Now, we cannot but hold that this office of Inspector of Police which is called a "special Inspector of Police" was merely an accessory to the office of Superintendent of Inland Revenue and of Inspector of Distilleries and Inspector of Licenses. That being so and Mr. du Vergé having received under Ord. 6 of 1878 a new appointment (there is a Government notice No. 79 of 1878 to the effect that the Governor approves of the appointment of Mr. du Vergé as Superintendent of Inland Revenue staff under that Ordinance) it is clear that his prior position of Superintendent of Inland Revenue in probation was superseded and recalled, and as the powers conferred upon him as special Inspector of Police were, as we interpret the letter above quoted, to give him facilities for the performance of his duties under the Inland Revenue Ordinances, it is difficult, nay, it is impossible for the Court to hold that his rights as a "special Inspector of Police" were continued under the new Ordinance.

But the matter becomes much clearer when we consider that Mr. du Vergé has the authority to prosecute under the Ordinance No. 6 of 1878 and for the purpose of that Ordinance. But when we come to consider the question of his position as prosecutor under the Penal Code, we think the matter is in a very different position. He prayed for all the penalties in the clause of the Penal Code, and it is difficult to see how a mere accessory appointment to another appointment which had been recalled could warrant him in taking up that privilege and that right of prosecution. Of course under the Ordinance No. 6 of 1878 there are various prosecutions, and this is a matter which might have been prosecuted under a clause of that Ordinance—and the question would then have been certainly a different one from what we have now to consider. But here we have to consider his title, and as we think he has no separate and independent title as an Inspector of Police but one merely accessory to an appointment which has since been recalled, we are of opinion that he had no right in this matter to appear in Court as an Inspector of Police and prosecute under the Penal Code.

The result of that view of the case is that the whole of his procedure is null.

The information was sworn by Mr. du Vergé as an Inspector of Police—that is null —the prosecution in Court is without any effect and the judgment of the Magistrate is null and void also.

We therefore sustain this appeal and quash the sentence of the Magistrate.

SUPREME COURT

—

CRÊCY DE LANUX,—Plaintiff.

and

THE ORIENTAL BANK CORPORATION IN LIQUIDATION AND ANOR,—Defendants.

—

Before

His Honor A. MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

Y. JOLLIVET and V. K/VERN,—Counsel for Plaintiff.

G. PITCHEN,—Attorney for the same.

W. NEWTON and P. L. CHASTELLIER,—Counsel for Defendants.

Hble. H. LECLÉZIO,—Attorney for the same.

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Record No. 23,456.

22*nd. February* 1888.

NOTICE OF FACTS—ORAL EVIDENCE—RES JUDICATA—FIRST JUDGMENT NOT FINAL—FORMER JUDGMENT IS NOT RATIO SCRIPTA—ACTION FOR TORTIOUS ACTS—ORDINANCE 19 OF 1868—ARTICLES 67 AND 68.

—

Short summary of the decision of the Court.

The plaintiff moved for leave to prove by witnesses a great number of facts mentioned in a notice drawn up much out of the ordinary way.

The application having been referred from Chambers to Court, the defendants raised in the first place the objection that there was "res judicata" as to the claim urged by the plaintiff, because the Court had in an action brought by the plaintiff against Pierre Frédéric Boyer de la Giroday investigated the same alleged fraudulent acts which are now charged against the present defendants as the accomplices of Pierre Frédéric Boyer de la Giroday, and had by their judgment dated 17th August 1887, fully exonerated the latter. The defendants contended that the judgment of the Court ought to avail the present defendants who are represented in the declaration as having acted in complicity with Pierre and Frédéric Boyer de la Giroday in all the fraudulent acts imputed to the latter.

Numerous authorities were cited to show that when several parties are jointly and severally liable (solidaires) any judgment given in favour of any one of them may be invoked by others.

The arguments of the defendants would be of great force were it not for the principle of law which is universally adopted by all commentators on the French Code and judgments of the higher Courts that a judgment cannot have the authority of "*res judicata*" until it has become final. Here the defendants were met by the fact that an appeal to Her Majesty's Privy Council had been made and allowed against the judgment of the Court given in the case of de Lanux v. Pierre and Frédéric Boyer de la Giroday. Until that appeal was decided the judgment of the Court did not form "*res judicata.*"

The defendants also contended that the Court having already given its decision on the points which the plaintiff brings for the second time, though against different parties, for the consideration of the Court, the Court had power to consider its previous decision as "*ratio scripta*" and prohibit the Plaintiff from again raising the same point.

The Court finding no authority in favour of that contention of the Defendants, rejected it.

The Court, likewise, did not countenance the plea of the Defendant that this case was one of nullity in proceedings for the sale of an immoveable property, which nullity cannot be questioned or raised after the delays prescribed by Ordinance 19 of 1868, Article 67 and 68. They ruled that this case was one in which plaintiff alleged certain tortious acts of the Defendant which according to his contention had been the cause of the sale by forcible ejectment of Estate "Walhalla."

As to the admissibility of the proof of the facts mentioned in the notice of Plaintiff, the Court allowed the proofs sought with regard to some of them and rejected that mode of proof with regard to a good many others.

(Vide Record No 23,456)

SUPREME COURT

ASSAULT WITH INTENT TO ROB—VERDICT OF ASSAULT—POINT RESERVED—ORDINANCE 29 OF 1853— SECTS 120 AND 122— MAJOR OFFENCE—ART. 305 PENAL CODE—LARCENY GIST OF THE OFFENCE—LARCENY DOES NOT INCLUDE ASSAULT— VERDICT INCOMPETENT.

On a question of law reserved whether a verdict for wounds and blows is competent upon a criminal information charging: (a) Larceny with violence and (b) Assault with intent to rob, the Court considered.

1o. *That it is not clear that under Sect.* 120 *of the local Criminal Procedure Ordinance,* per se, *the jury is empowered to find an individual guilty of a minor offence when a major offence is the subject of the information.*

2o. *That a conviction for a minor offence on a major charge is warranted where both charges are essentially of the same nature.*

3o. *That a charge of assault with intent to rob, is not a separate charge of assault independent of the larceny, and the gist of the offence actually charged here under Articles* 303 *and* 305 *of our Penal Code is the larceny, which does not "legally or technically include an assault."*

4o. *That the object of Sect.* 122 *of our Criminal Procedure Act is apparently to render a finding for assault competent upon an indictment charging the highest form of assault; viz: murder or manslaughter.*

5o. *That the verdict was, consequently, not competent.*

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REGINA,—Plaintiff.

v.

ALIPHON,—Defendant.

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Before

His Honor SIR E. J. LECLÉZIO KT,—Chief Judge.

His Honor A. MURE,—Puisne Judge.

His Honor T. C. WILLIAMS,—Puisne Judge.

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HBLE PROCUREUR GENERAL, appearing for the Plaintiff.

E. SERRET, for the Defendant.

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Nos. 11 & 26.

5th. & 6th. March 1888.

This is an argument upon a point reserved by a judge sitting at assizes. The accused was charged with Larceny accompanied by violence under articles 303, 305 from Penal Code. There were other counts in the information, but upon none of the counts did the jury return any specific verdict. Count No. 2 set forth an assault with intent to rob, an offence which, apart from the major larceny, does not seem clearly defined in the Code. The finding of the jury was one of "wounds and blows," without any re-

ference to larceny; and, although the information was clearly and admittedly laid under article 303 and 305 only, it is contended for the Crown, that this finding would justify the judge presiding in passing sentence as he was asked to do, under Article 230 of the Code, under which the information was certainly not laid. The learned judge, having in summing up directed the jury that they could not upon this information return a verdict of "Wounds and blows" unaccompanied with the element of larceny, accepted, nevertheless, upon application, that verdict when returned, as a special verdict, to be construed in reference to the information by the full court.

It was contended yesterday upon the part of the Crown —1st that upon any information charging the major offence a verdict for the minor offence may be returned; and the authority of section 120 of our Criminal Procedure Act was quoted in support of the contention— 2nd that section 122 of the same act empowers a jury where a felony is charged which includes an assault, to acquit upon the felony, but to find a verdict of guilty upon the included charge of assault, if the evidence warrants such a finding.

Upon the first point, as regards section 120 of our Criminal Procedure Act, it is to be remarked, not only that the clause is only applicable to several persons charged under the same information, but that it is quite open to argument, that the minor offence can then only be brought home to a portion of such persons charged, when against another portion, the major offence has been proved. We are not satisfied that section 120 *per se* places it in the power of a jury, to find an individual guilty of a minor offence when a major offence is the subject of the information. Our criminal jurisprudence does indeed in certain cases warrant a conviction for a minor offence, on a major charge, where both charges are essentially of the same nature; but it is not here contended that violence is an essential of larceny.

Section 122 of the Criminal Procedure Act is more to the point in the present case. It is a reproduction of 1 Vic. C. 85 S. II, a section which, on account of conflicting interpretation, was long since eliminated from the English Statute book, but which, still finds a place in ours. It enacts that when the felony (or as here the "crime") charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony and find a verdit of guilty of assault." The dictum of Jervis C. J. in R. v. Reid and others (L. J. N. S. Vol. XX cases connected with the duties of Magistrates p. 69) is that this section of the English Statute does not apply to "every "case in which upon the face of the indict- "ment an assault is charged, but only where "the offence of felony charged legally and "technically includes an assault." Subsequently in R. v. Birch the view appears to have been adopted that the assault need not be connected with the felony; but in that case the assault was charged as a separate and independent offence in a special count of the indictment, which it is not in the case now before us. There is here no separate charge of assault independent of the larceny and the gist of the offence actually charged here under Articles 303 and 305 of our Penal Code is the offence of larceny, which does not "legally or technically include an assault" to use the words of C. J. Jervis, but which with us, is a misdemeanor simply, aggravated into a crime or a felony, by the circumstance of an accompanying assault. But that circumstance must be strictly an attendant circumstance of aggravation in order to make the major charge a felony,

and, where the idea of one of the essential elements in the felony is expressly repudiated by the jury as in this case, we are not satisfied that Section 122 of Criminal Procedure Act applies, the special verdict of the jury here being, strictly what is tantamount to a verdict of acquittal upon one misdemeanour, and of conviction upon another misdemeanour not charged as a separate offence. To eliminate from the face of the record in this case the assault found proved is not to leave any felony behind unproven, but a mere misdemeanour. And to eliminate similarly the major charge of larceny is to leave a charge, not of assault or of wounds and blows simply, but of assault accompanied by or attendant upon a larceny, and no other. The charge is one of larceny accompanied by violence; and we do not think it competent for a jury upon this charge under Section 122 of the Criminal Procedure Act to find a verdict of simple assault or of wounds and blows unaccompanied by larceny or by an intention to steal, unless such an independent assault is expressly charged or expressly included in the information.

This much vexed Section 122 of the Act, must, we think, so long as it remains law with us, be read with the utmost strictness. So read, it contemplates first of all a felony and an acquittal on a charge of felony; and this acquittal, as a matter of fact, there was not in the case now before us. Next, it would seem to contemplate a conviction for that which is an offence (when it is not independently charged) only when immediately and subsidiarily included in the felony, and we think that this offence is not substantiated when the subsidiary assault is such an essential element of the major charge that without it, the major charge would not amount to a felony or a crime. The object of the section of Lord Denman's Act 7 W 4—1 V c. 85 of which our S 122 C P Act is a reproduction, was apparently to render a finding for assault competent upon an indictment charging the highest form of assault, viz: murder or manslaughter. But murder and manslaughter are in their essence felonies, here as in England, while larceny here is not in its essence a felony or crime. And to acquit of a felony while finding proved a charge involved in, but independent of, that felony (which we think is the case contemplated by S 122 where no independent assault is expressly charged) is not the same thing as to acquit on a charge which is only a felony in conjunction with another offence, and to find a verdict of guilty of that other offence apart from the element which alone makes the major charge a felony.

We hold, for the reasons stated, that the special verdict recorded by the direction of the learned judge in this case was not competent upon the information as laid. We construe the verdict consequently to be one of acquittal; and we order the prisoner's discharge.

SUPREME COURT

ACTION IN DAMAGES—TRESPASS—RS. 50 CLAIMED — APPEAL — OWNERSHIP OF LAND IN QUESTION—VALUE OF THE LAND—AFFIDAVITS ORDERED TO BE SWORN—COSTS.

In an action for Rs. 50 as damages for a trespass and destruction of a bambous hedge, the right of ownership of the whole plot of land bordered by the bambous was put into question by the defendant.

On appeal, the defendant urged that the value of the whole piece of ground did not come up to Rs. 200, the statutory amount needed to make the case an appealable one.

The Court considered that the evidence of the present value of the land was not sufficient, and ordered the parties to file affidavits of what they considered the true value.

Costs reserved.

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VILBRO,—Appellant.

and

CHELLEN, —Respondent.

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Before

His Honor A MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

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B. COLIN,—Counsel for Appellant.
E. ROCHERY,—Attorney for the same.

W. NEWTON,—Counsel for Respondent.
A. PITOT,—Attorney for the same.

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Record No. 876.

13*th March* 1888.

His Honor MR. JUSTICE MURE.

This is an action which arose in the lower Court in which the plaintiff sought damages to the extent of Rs. 50 for trespasses upon his property. In the Court below both the parties, as well as the Judge seemed to have considered and acquiesced in the view that this claim for damages was made in consequence of a trespass upon the property of the plaintiff. The question arose then between the parties to whom the property belonged; the plaintiff of course, bringing the action into Court in virtue of its being his and the defendant on the other hand, alleging a right to the same property. I consider it unfortunate that the parties so dealt with the matter, for the alleged trespass consisted in cutting down a stripe of bamboo trees—"*bambou de chine*" which was very narrow and some 28 feet in length; and if the question had been limited to the mere piece of ground upon which these bambous were planted, it would I think have been more consistent with the object which the owner sought to obtain by his action and a more reasonable course for the parties to have taken. But in place of that, the question raised in the lower Court involved of necessity the plaintiff's right of property in the ground in which the alleged trespass was said to have been made, and we have to consider whether the claim of damage being only one of the Rs. 50, the appeal is a competent one. If we were to look on this matter merely as a question involving a right of property of the ground upon which the bambous were planted—and if the question of the whole property, the acre or acre and a half of land arose between these parties in another action, it is conceivable that different Judgments might be come to, or that different Courts might be applied to, to determine the right of property. That being so, it is undoubtedly important for these parties that the Court below having taken the view that the whole of the plaintiff's right of property was in question, the matter upon which the question of trespass depends should now be determined by the Court and it was contended by the defendant that even taking in on that footing the value of the subject did not amount to the £20 or Rs. 200 which was necessary to bring the matter within the appealable amount.

It is true that this subject, as stated by the plaintiff, is one which was bought some 30 years ago—many years ago—for a sum of Rs. 159; and it is to be borne in mind that the plaintiff and his wife only possessed two thirds thereof—so that the share of Chellen and his wife amounts to Rs. 106, while one third of the value which belongs to some other person, who is not in this process is Rs. 53 — still the amount of damages claimed was Rs. 50, although the damages given were just Rs. 30.

Now it is very clear that, even taking the value of the property as it was paid for by Chellen many years ago, the value of the subject at stake is very near the amount which would make it appealable, and in these circumstances, when an objection is taken to the competency of the appeal, and the value of the subject is maintained as it is here, for we cannot but suppose that during the time this property has been in the possession of Chellen it may have increased in value—there is no other alternative that we see than resorting to the course which was adopted in the case of Ayoob v. Lucas, reported in the reports for 1880, page 113, in which the judge who was then presiding in the Bail Court directs that an affidavit of value be made by the parties who sought to appeal from the judgment when the value of the subject was uncertain. That is the course which we think must be followed in this case and we accordingly direct that within a delay of 10 days, affidavits of the value of the property in this litigation shall be produced. Of course we do not mean that the appellant will lodge an affidavit only, but we allow the appellant and respondent to lodge affidavits of value of the subject within the time I have mentioned, (ten days) and we reserve the costs.

SUPREME COURT

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JUDICIAL SALE— FOLLE ENCHÈRE— WITHOUT COSTS—MEANING OF THOSE WORDS—DECISION OF MASTER—APPEAL—HEIRS UNDER BENEFIT OF INVENTORY—THEIR LIABILITY—ART. 803 C. C.—ART. 103 C.P.C.—APPEAL DISMISSED.

A judgment by consent having been filed in a case of folle-enchère initiated against certain minors, who were prosecuting the judicial sale of the same immoveable property, the Master decided that the words "no costs" in the said judgment meant that each party should bear his own costs.

On appeal, it was contended on behalf of the said minors that heirs under benefit of inventory cannot be mulcted with costs whilst carrying on a litigation to benefit an Estate. (Arts. 803 C. C. and 103 C. P. C.)

Held by the Court :

1o. *That it was important for the minors to stop the proceedings for the folle-enchère.*

2o. *That by the judgment by consent, the minors secured the costs of the judicial sale begun by them.*

3o. *That it is conceivable that under such circumstances they consented to bear the costs incurred by them on the proceedings for the folle enchère.*

4o. *That though the Master was wrong to allow certain parties to the judgment to file affidavits to explain what they meant under the compromise arrived at, his interpretation of the above words "no costs" was correct.*

Judgment of the Master upheld with costs.

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BLANDIN DE CHALAIN,—Appellant.

and

BLANDIN DE CHALAIN & ors,—
Respondents.

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Before

His Honor A. MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

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P. L. CHASTELLIER,—Counsel for Appellant.
E. PITCHEN,—Attorney for the same.

V. DELAFAYE & ors,—Counsel for respondents.
E. LAURENT & ors,—Attorneys for the same.

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Record No. 24,267,

13*th March* 1888.

The point submitted for our consideration is the interpretation of the word *no costs* in the judgment by consent before the Master, which put a stop to all the proceedings relative to the "Folle Enchère" of the property belonging to Ally Khan. Mr. Chastellier for the representatives of widow Blandin de Chalain cited Article 803 of the Civil Code and Article 132 of the Code of Civil Procedure and he argued that heirs under benefit of inventory cannot be mulcted with costs, whilst carrying on litigation with the object of benefiting the Estates forming part of the succession. Mr. Chastellier is quite right in his statement of the law, but it is not correct to say that the Master of the Supreme Court condemned Mr. Chastellier's client to pay costs. The Master simply held, that in terms of the compromise which had taken place between the several parties to the lawsuits carried on before his Court, Mr. Chastellier's clients had renounced their claim to costs.

The Court thinks that the Master gave a proper interpretation to the terms of the compromise between the parties.

Whilst the judicial sale of the Estate was carried on by widow Blandin de Chalain, proceedings in "Folle Enchère" were instituted by two parties holding rights under a former sale of the Estate. Now these rights being practically those of unpaid vendors were *primâ facie* very strong.

The Court cannot decide what the judgment of the Master would have been on the application of Mrs. Blandin de Chalain that the proceedings in "Folle Enchère" should be set aside, but in the event of the Master holding that the "Folle Enchère" must be allowed to follow its course, the proceedings for the judicial sale of the Estate would have been swept away and the costs made by widow Blandin de Chalain for the purpose of that sale would have been lost to her. They would not have benefited the succession but the reverse,—Her interest therefore required that the proceedings for the "Folle Enchère" should be stayed or set aside and it is quite conceivable that she should have consented to lose the costs incurred by her against the parties suing the "Folle Enchère" with a view to saving other and more important costs, and allowing the proceedings begun by her to follow their course to a proper termination. Thus she secured the costs of that proceeding and gave her attorney the carriage of the sale for which he had been paid.

As for the parties who had applied for the "Folle Enchère" of the Estate, we must suppose that when they renounced their costs, it was in the expectation that the other parties opposing them would also renounce their claim to costs. It cannot be said that widow de Chalain or her representatives renounced their costs, whereby charging them not against the defendants but against the Estate. The practical effect of the arrangement was to diminish by a corresponding sum, the mortgaged and privileged claims of the respondents on the Estate.

The Master was wrong in admitting the accountant in Bankruptcy and others to relate what passed between the parties with reference to the compromise and to explain by affidavits what was understood by them, but the Court holds that the interpretation he gave to the terms of the compromise is correct and that his judgment must be upheld with costs.

As regards the parties who have not litigated the question on its merits or who have abided by the decision of the Court, they will bear their own costs.

SUPREME COURT

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COSTS—ACTION IN DIVORCE—RECONCILIATION —COSTS FOR THE SUIT—COSTS FOR ALIMONY AND PROVISIONS— COSTS BY THE WIFE TO "ESTER EN JUGEMENT"—RECONCILIATION NOT EQUIVALENT TO A DISMISSAL—CERTAIN COSTS ALLOWED.

A reconciliation having taken place pending a suit in divorce, the attorney of the wife (plaintiff) asked the Court to decree that he was entitled to recover from the husband :

(a) The costs incurred at the request of the wife in the suit in divorce.

(b) The costs made in an application for provision under Art. 878 C. P. C.

(c) The costs of an application referred from Chambers to the Court to allow the wife to "ester en jugement" in a complaint entered by her against her husband before the District Court.

The husband contended that no costs were due by him :

1o. *Because a reconciliation was tantamount to a dismissal of the action.*

2o. *Because under Art. 1426 C. C. the community was not liable for a debt of that nature.*

Held by the Court :

1o. *That a reconciliation was not at all equivalent to a dismissal of the action.*

2o. *That, contrary to what had occurred in the cases decided by the French Courts, the attorney here had not been guilty of any laches, in as much as the reconciliation had taken place before the date the Court itself had fixed for the hearing of the application by the wife for an alimony and provisions for costs to be incurred by her.*

3o. *That the said attorney should recover from the husband, as head of the community, the costs incurred by the wife under headings (a) and (b).*

4o. *That the costs claimed under heading (c) did not fall within Art. 878 C. P. C. and consequently should not be allowed.*

5o. *As the point here mooted was delicate and new and as the case was a special one, no costs were granted on the argument itself.*

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MOOTOOSAMY PILLAY COOPPAPOULLÉ THE WIFE,—Plaintiff.

and

MOOTOOSAMY PILLAY COOPPAPOULLÉ THE HUSBAND,—Defendant.

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Before

His Honor SIR E. J. LECLÉZIO, KT.,—Chief Judge.

His Honor A. MURE,—Puisne Judge.

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W. NEWTON,—Counsel for plaintiff.
H. BERTIN,—Attorney for the same.

P. L. CHASTELLIER,—Counsel for defendant.
A. LHOSTE,—Attorney for the same.

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Record No. 24,270.

15*th March* 1888.

His Honor THE CHIEF JUDGE.

The question which is before the Court in this case is only one of costs—There was a demand in divorce before the Court, but we were informed that there had been a reconciliation between the parties and that the petitioner had given up her action, but there was a motion made on behalf of the attorney in order that the costs which had been made at the request of the wife in the action in divorce and also certain costs made in an application for provision in virtue of Article 878 of the Code of Civil

Procedure, should be paid to him by the husband. It was also moved that the costs of an application which was referred from Chambers to this Court—and which was an application in order to allow the wife to "*ester en jugement*" in a complaint against the husband before the District Court—that these costs too, should be paid by the husband.

The motion was resisted by the Counsel for the husband on the ground that under Article 1426 of the Civil Code, the husband was not liable. There is no doubt that that article is very positive in its terms, it says: "Les actes faits par la femme sans le "consentement du mari et, même avec "l'autorisation de la justice, n'engagent "point les biens de la Communauté, si ce "n'est lorsqu'elle contracte comme mar- "chande publique et pour le fait de son "commerce."

The principle contained in this article is very clear and it has been applied by the Courts in France in cases in which the wife was authorized to enter actions before a Court of Justice. It was held that the judge had the right to authorize the wife, if she was not authorized by her husband, but that it was only the property belonging to the wife that was responsible for the costs in such cases. But, at the same time, it was held also that there was one exception to that principle and that exception was to be derived from Article 878 of the Code of Civil Procedure and that a provision might be ordered by the Court for alimony and for costs in order to protect the wife and allow her to proceed with an action in divorce or for "*séparation de corps*" but it was ruled that the attorney of the wife could not claim against the husband beyond the limits of that provision. In the present case it was stated that as the wife had given up her action on account of a reconciliation between her and her husband, that that reconciliaton should be considered as a dismissal of the case, and besides as no provision had been granted before the reconciliation, that the attorney of the wife had no right to claim the costs already made on behalf of the wife on account of his not being within the terms of the only exception to Article 1426 of the Civil Code.

With regard to that question of reconciliation which was urged as being tantamount to a dismissal of the case, we must say that we do not agree with that proposition. We do not see any positive authority on that point except a short phrase quoted from Mr. Dallez in his Repertoire Verbo "*Contrat de mariage*" No. 1072, in which he says, merely *en passant*, that a reconciliation must be considered as being equivalent to a dismissal of the action. A dismissal implies that the petitioner was wrong, whereas a reconciliation may imply forgiveness of her husband's wrongs.

Besides, we are here in presence of a case which is quite special,—we can understand that when a provision has been asked for and obtained, if during the proceedings there is no new application for the increase of that provision, that when the case is over the Courts in France should have refused to allow the attorney to claim the whole amount of the costs that have been made beyond the limits of the provision granted. In such a case it was considered that it was his own fault, or that of his client, if he had not applied for an extension of the provision and that he should therefore rest contented with the provision which he had asked for the wife when the case was begun—but the circumstances of the present case cannot be at all assimilated to those mentioned in the *arrêts* of the Courts of France which have been quoted to us. In the first place we see that the reconciliation meeting took place on the 16th December 1887, the conclusions of the "Ministère Public" upon the Memorandum of the

judge were on the 17th December and the order authorising the wife to sue was dated the 19th December.

It was on that very same day that a motion was made before the Court for alimony and provision for costs, but as the Court was sitting only accidentally on that day — the long vacation having already begun— the rule was made returnable on the 6th February 1888. Between the date of that motion and the day on which the rule was returnable it appears that the parties were reconciled; but then there were no laches at all on the part of the attorney or of his client—Immediately after he had obtained the order he made his application for provision, which is allowed to be made under Article 878 of the Code of Civil Procedure.

Under those circumstances, we consider that he is entitled to obtain from the husband the payment of the costs which have been made at the request of the wife for beginning this action in divorce and also the costs of the application made to obtain the provision for alimony and costs.

But with regard to the third application which we have to consider now, that is the costs of the application in Chambers and the reference to Court concerning the authorization to *"ester en jugement"* before the District Court—we think that they do not come within the only exception contained in our law, Article 878, which speaks only of the provision for alimony and costs in the divorce action or action for *séparation de corps*.

The decision of the Court therefore, in this case, is that the attorney has the right to claim from the husband as the head of the Community the costs made for entering the divorce action before this Court and also for the application for alimony and provision, but no other costs.

We do not think that costs should be given on the argument, because this was a question of a very delicate nature and one which is quite new before the Court, and the case was altogether a special one.

We therefore think that the application such as it is granted should be granted without costs.

SUPREME COURT

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DIVORCE—HUSBAND INSANE—MADNESS GROUND FOR RESTRAINT BUT NOT FOR DIVORCE — PETITION REJECTED.

The Court ruled, in this case, which was an application for a divorce "a vinculo matrimonii" that the "sævitiæ" on the part of the husband resulted from his mental unsoundness, and that madness even when it was unsuspected before marriage is ground for restraint but not for a divorce "a vinculo matrimonii."

Petition rejected.

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DE RUNE THE WIFE,—Plaintiff.

and

DE RUNE THE HUSBAND,—Defendant.

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Before

His Honor SIR E. J. LECLÉZIO KT.,—Chief Judge.

and

His Honor F. C. WILLIAMS,—Puisne Judge.

—

A. HUGUES,—Counsel for plaintiff.
M. LEBLANC,—Attorney for the same.

M. NOEL,—Counsel for defendant.

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Record No. 24,040.

15*th March* 1888.

The question in this case is whether we should grant a divorce *a vinculo matrimonii* to the petitioner on the ground of sundry acts of

violence which she has suffered at the hands of her husband since her marriage. There is little doubt upon our minds that the respondent who is admittedly a lunatic now, was in a mental condition more or less unsound before his marriage to the petitioner in 1880.

Shortly after the marriage, the respondent left the petitioner returning at intervals and the petitioner in her evidence stated that he was never asked, nor did he ever assign any reason for these absences and that she does not think he knew what he was doing. The acts of *sævitiæ* complained of occurred three and four years after the marriage. The account of the circumstances leading to them which the petitioner gives in her petition was in some respects inconsistent with that afforded by the evidence. The assaults and abuse appear to have been unreasonable and unprovoked, and, after careful consideration, we have arrived to the conclusion that these acts of *sævitiæ* on the respondent's part resulted from his mental unsoundness and thus that, whatever ground they might afford for the restraint of the husband or for a judicial separation, they afford none for a divorce *a vinculo matrimonii* which is the prayer of the petitioner,— Madness, even where it was unsuspected before marriage, is no ground for a divorce according either to the French or English law. As was remarked by the judge in the case of Hall v. Hall (L. J. 33 Matrimonial Causes p. 65), a case in which adultery against the respondent appears to have been proved as well as great cruelty, "an insane man is likely enough to be "dangerous to his wife's personal safety, "but the remedy lies in the restraint of the "husband, not in the release of the wife."

The prayer of the petitioner is refused.

SUPREME COURT

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APPEAL FROM DISTRICT COURT—NO DISMISSAL —OBJECTION IN LIMINE — ORDER FINAL— OBJECTION OVERRULED.

A plaintiff before a District Court having been ordered to furnish security "judicatum solvi", and having failed to do so within the fixed delay, her case was ordered to be struck out.

The plaintiff appealed against the order to find security.

It was urged "in limine" that as there had been no dismissal of the case by the Court below, the right of appeal did not lie.

Held by the Court.

1o. *That when the order has a character of finality and places a party in the impossibility of moving further in the matter, the right of appeal lies.*

2o. *That when the Magistrate caused the case to be struck out, there is no doubt that the order by him previously given to furnish security had acquired a character of finality.*

The objection was overruled and the question of costs reserved to be decided on the merits.

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ALEXANDRINE,—Appellant.

and

CHAILLET & ORS,—Respondents.

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Before

His Honor SIR E. J. LECLÉZIO KT.,— Chief Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

V. DELAFAYE'—Counsel for Appellant.
E. PITCHER,—Attorney for the same.

Y. JOLLIVET,—Counsel for Respondents.
H. THATCHER,—Attorney for the same.

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Record No. 897.

16*th March* 1888.

His Honor THE CHIEF JUDGE.

This is an appeal from a judgment which was delivered on the 9th February last by the Senior District Magistrate of Port Louis.

It appears that the appellant, who was plaintiff in the Court below and of whom a debt had been claimed, asked for a judgment declaring that she was no longer indebted to the defendants, having paid the balance due by her to them and that as a consequence the provisional seizure of her moveable property be set aside. An application was made against the plaintiff now appellant for security *judicatum solvi* and the Magistrate on the 26th of January had ordered that within a delay of eight days the security should be furnished, otherwise the case should drop, according to the terms we read in the record. Now it would appear that the security was furnished but the solvency of that security being contested it was withdrawn on the 6th February. On the 9th of February the case was again called before the District Court and on that day there was an application on the part of the plaintiff for an extension of the delay to furnish another security. That application was refused by the Magistrate and he ordered the case to be struck out.

It is from that order of the Magistrate that an appeal has been made and that appeal according to the appellant's Counsel also includes an appeal from the interlocutory order of the 26th of January. A point was taken *in limine* for the respondents, to the effect that as there had been no dismissal in this case there was no final jugement and thefore no appeal could lie to to the Supreme Court. We have examined this point and we are of opinion that it is not necessary in all cases that there should be a dismissal of the action itself in order to render a decision or order of the Magistrate final. It may happen, for instance as in the present case, by a [redacted] of extension of delay and by the mere order of striking out the case, that a party be placed in the impossibility of moving in the matter—It was not necessary as is was suggested for the respondents that the appellant should have first asked for the case to be put again on the Cause List in order to move for a dismissal of the action itself. This would have been a useless formality under the circumstances. Provided the order has a character of finality and places a party in the impossibility of moving further in the matter, that is sufficient to allow of an appeal. In this case there is no doubt that the interlocutory order which was given on the 26th of January by the Magistrate had acquired a character of finality on the 9th of February when the extension of delay was refused and the case was ordered to be a struck out. We therefore consider that the plaintiff had a right to appeal to the Supreme Court. The case will be replaced on the Cause List in order to be argued on the merits of the appeal itself on which we express no opinion.

The costs of this preliminary objection are reserved until we have heard the appeal on the merits.

SUPREME COURT

APPEAL TO PRIVY COUNCIL—MOTION FOR PROVISIONAL EXECUTION OF JUDGMENT—PECULIAR CIRCUMSTANCES—MOTION REFUSED.

The respondent having moved for provisional execution of a jugement pending an appeal to the Privy Council, the Court considered that :

1o. *That the respondent was not here in the position of an ordinary litigant claiming the restitution of rights of which he had been unjustly deprived.*

That the appellants would in case of provisional execution, be put to considerable expenses which would prove useless to all if the judgment appealed from were reversed.

In virtue of the discretionary power vested in them by the Order in Council, the Court refused the motion.

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D,—Plaintiff.

and

THE ORIENTAL BANK CORPORATION IN LIQUIDATION,—Defendant.

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Before

His Honor Sir E. J. Leclézio Kt.,—Chief Judge.

His Honor A. Mure,—Puisne Judge.

and

His Honor F. C. Williams,—Puisne Judge.

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H. Galéa,—Counsel for Plaintiff.
W. H. Edwards,—Attorney for the same.

P. L. Chastellier,—Counsel for Defendants.
E. Duvivier,—Attorney for the same.

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Record No. 23,877.

16*th March* 1888.

This is a motion made by the plaintiff now respondent, Reid, to obtain the provisional execution of the judgment of the Court of the 7th November last, which has been appealed from by the defendants now appellants. This motion is objected to on the ground that it would be more consistent with real and substantial justice that the Estate *St. Julien* should remain in possession of the whole water of the Canal, the subject matter of the contestation pending the appeal, than to order the half of the water to flow to the respondent's land. The affidavits put in by the appellants declare that the whole of the water is essential for the requirements of the Estate and that very expensive works would have to be made in order to procure an additional supply of water for next crop if the appellants were ordered to make the division of the Canal at present.

The respondent is owner of only 7 acres out of the 312 acres called Duvivier's land and the Court has only found him entitled to the passage of the water, declared to belong to Duvivier's land through his plot of 7 acres, he has not been declared to be the owner of the whole of the water attributed to Duvivier's land Reid had at first purchased only the rights belonging to Dick, the preceeding proprietor of those 7 acres, in the water of the St. Julien Canal which, at the time of that purchase, had ceased to flow upon Dick's land. An action was notwithstanding entered by Dick against the Central Sugar Estates for the recovery of that water in which Reid afterwards intervened, but Dick was nonsuited. It was then that Reid purchased 7 acres of land from Dick and entered an action in his own name for the recovery of the water in which he was successful to a certain extent.

There is no doubt that what he did was lawful but at the same time his position is not that of an ordinary litigant claiming the restitution of rights of which he has been unjustly deprived. Besides, it has not been denied that if the judgment of the 7th November were to be executed now, the appellants would be compelled to spend large sums of money for an additional supply of water, and that if the judgment of the Court were afterwards reversed by the Privy Council those expenses might prove useless.

Taking all these circumstances into consideration, and being of opinion that under the Order in Council we are entitled to decree or refuse provisional execution, we think that the appellant should in this case await the final decision of the Privy Council on

his right before seeking to put it in force, and that this is not a case in which the Court should allow provisional execution. We accordingly refuse the motion, but we order the appellants to furnish within fourteen days good security to the amount Rs. 5000 for the due performance of such judgment as Her Majesty shall think fit to make.

Costs for appellants.

SUPREME COURT

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APPEAL FROM CONVICTION OF BENCH OF MAGISTRATES—ORDINANCE 3 OF 1883, SECTION 7—TITULAR MAGISTRATE OF THE SMALLER DEPENDENCIES ACTING IN MAURITIUS—BENCH PROPERLY COMPOSED—APPEAL DISMISSED.

The Commission of the acting Magistrate of the smaller dependencies is not dissolved by his appointment as Acting District Magistrate for one of the districts in Mauritius.

A Bench, of which he was part, was held, therefore, to have been competently convened and formed for the District of Port Louis under Ordinance 3 of 1883, Section 7.

—

BANGARD, — Appellant.

and

QUEEN,—Respondent.

—

Before

His Honor F. C. WILLIAMS,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

W. NEWTON,—Counsel for Appellant.

G. BOULOUX,—Attorney for the same.

L. ROUILLARD, SUBSTITUTE PROCUREUR GENERAL,—Counsel for Respondent.

J. GUIBERT,—Attorney for the same.

—

Record No. 544.

20th March 1888.

The appeal in this case is from a conviction by a Bench of Magistrates sitting at Port Louis, who found the appellant guilty of embezzlement, and sentenced him under Art. 333 of the Penal Code.

The appeal was argued before us upon two grounds: 1st that the bench was incompetently formed, and 2nd that certain evidence was irregularly admitted. Upon the first point, the question for our consideration is whether Mr. Boucherat had jurisdiction to sit upon the bench of three magistrates, as the acting magistrate for the smaller dependencies is empowered to do by § 7 of Ordinance No. 3 of 1883, he having, previously to the trial, been appointed Acting District Magistrate of Flacq in this Island as notified in the Government Gazette of September 22nd 1887.

The argument for the appellant was that Mr. Boucherat's appointment to an Acting Magistracy in Mauritius *ipso facto* dissolved his Magisterial Commission for the Oil Islands and abrogated his powers and authority to act elsewhere than for Flacq. We do not hold that view. Unless the duties of two acting officers are manifestly incompatible, we see no *prima facie* evidence in the appointment to one acting office that another acting office is vacated. The Commission of Mr. Boucherat was not expressly revoked when he was appointed to the Acting Magistracy of Flacq, he did not resign his older appointment, but as we were informed in the course of the argument, continued in the enjoyment of its emoluments and, as a matter of fact, he has since returned to its duties without a fresh Commission —It might have been better if the Government Notice published in September 22nd of 1887 had stated that his acting appointment to Flacq, was to be held in conjunction with the other acting appoint-

ment, but we do not think that the neglect to be thus specifie had the effect of revoking Mr. Boucherat's former commission. As a 2nd ground of appeal, it was argued that secondary evidence of certain dealings of Bangard with Rouhier, his employer, had been received and the learned Counsel for the appellant contended on the authority of the recent decision in Regina v. Gibson (Cox's Criminal Law Cases Vol. XVI Part III) that although no objectiou was made at the time when the evidence was given, the fact of improper evidence having been received vitiated the conviction.

The facts to which the learned Counsel refers are as follows : Bangard, who was Rouhier's agent for supplying meat and other provisions to several persons in the country, came every day, or nearly every day, to the office of Rouhier for the purpose of obtaining the reimbursement of the sums alleged to have been spent by him. The details of his daily expenditure were entered in a sort of memorandum book which he handed over to Rouhier's Cashier ; and that memorandum book which was kept by Bangard, always appears to have remained in his possession. The Cashier transcribed into a book kept for the purpose, the entries contained in Bangard's book. He then signed or initialled it and returned it to Bangard, paying at the same time the sum for which the application was made.

The contention of the appellant is that Bangard's memorandum book was the *primary* evidence of the dealings between Rouhier and Bangard and that, before producing Rouhier's books, and introducing evidence to prove Bangard's application for money and the payments made to him, the prosecution ought to have shown that a summons to Bangard to produce his book had remained without effect.

The Court does not hold this view of the case. When a firm pays or receives money through a clerk who is virtually an outside agent, it must rely for the proof of its dealings on its own books rather than in memorandum books which are destined to remain in the possession of the outside agent and which are, more or less, his property.

Besides, in the present case, the very persons by whom Rouhier's books were kept have been called as witnesses, and their evidence corroborating the entries in Rouhier's books, has been accepted as trustworthy by the learned magistrates who tried the case. That evidence showed the applications for money made by Bangard and the payments made by him and to him and we think that the case could not have been proved in any other way.

It was indeed open to appellant to check by means of his memorandum book the entries contained in Rouhier's books, but he did not choose to do so.

We therefore confirm the conviction from which the present appeal is made – with costs.

SUPREME COURT

WRIT OF HABEAS CORPUS—ORDINANCE 12 OF 1882—ORDINANCE 7 OF 1873—RECOGNIZANCE ESTREATED—SURETIES CONDEMNED TO PRISON—WARRANT OF DISTRESS—AMENDED WARRANT—RETURN TO THE WRIT—TIME OF SUCH RETURN— RECORD INCOMPLETE — WARRANT ONLY LOOKED AT—WRIT DISCHARGED.

The applicants who had been condemned to 6 months imprisonment for non payment of a recognizance given by them before a District Court for the appearance of an accused party, argued on a writ of Habeas Corpus.

1o, *That before committing them to prison, the Magistrate should have issued a warrant of distress against their goods.*

2o. *That there were two warrants here ; a first one which was defective, and a second, not so defective, but which had been filed too late, i.e. when the writ had been issued and the case placed on the list.*

3o. *That certain entries in the Record were defective.*

Held by the Court :

1o. *That under Ordinance* 12 *of* 1882, *Art.* 9, *the amount of a recognizance on the criminal side may be recovered as a fine, and that under Ordinance* 7 *of* 1873, *the payment of a fine can be enforced by imprisonment at once without previously issuing a warrant of distress.*

2o. *That in England, an amended warrant of commitment may be put in at any time before the return to the writ has been made.*

3o. *That in Mauritius, the time of the return to the writ is the moment of the calling of the case before the Court.*

4o. *That when this case was called, the amended warrant had been filed and it was produced to the Court.*

5o. *That the Court, on a writ of Habeas Corpus will generally look only at the warrant, in order to ascertain whether the prisoner has been lawfully committed, and not at the Record.*

The Court however, took this opportunity to request District Magistrates to keep their Records as complete as possible ; and to make full entries therein.

Writ discharged.

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Ex parte

BEDESSEE & NAZARALLY,—Applicants.

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Before

His Honor Sir E. J. Leclézio Kt.,—Chief Judge.

The Hon. A. Mure,—Puisne Judge.

and

The Hon. J. Rouillard,—Puisne Judge.

—

B. Colin,—Counsel for Applicants.

E. Rochery,—Attorney for the same.

The Hon. L. Rouillard, Substitute Procureur and Advocate General,—Counsel for the Crown.

—

20*th March* 1888.

His Honor The Chief Judge :

In this case the learned Counsel for the two prisoners who are now before the Court has taken two points on their behalf. In the first branch of his argument he has stated that the learned Magistrate has misconstrued Ordinance No. 12 of 1882, when after having estreated the recognizance which was signed by those two men for the appearance before the Court of a party charged with a certain offence (one Mahomed Taleb) he had afterwards committed those two men to Jail without first issuing a warrant of distress, in order to see whether they had goods which could answer for the amount of the recognizance which had been signed by them. Upon this branch of the argument we have already expressed an opinion yesterday when we told the learned Substitute Procureur General that it was not necessary for him to answer the Counsel for the prisoners as to this point. We are very clearly of opinion that the Magistrate has construed the law such as it is to be construed in this case. Article 9 of Ordinance 12 of 1882 first states that " any recog- " nizance taken by a magistrate or for " appearance before a magistrate or his " Court may be estreated on the order of " the Court held by such Magistrate or by " the person for the time holding his office, " and the amount thereof even when exceed- " ing Rs. 1000 may be recovered in the same " manner, if the recognizance be furnished " on the Civil Side of the Court, as debts, " and if the recognizance be furnished on " the Criminal or Police side of the Court, " as fines ordered to be paid by such Magis- " trate may be recovered."

Now if we refer to Ordinance No. 7 of 1873 Article 2 we see that fines are to be recovered by a process which is different from that which is enacted by Ordinance No. 35 of 1852, that is to say that instead of ordering a warrant of distress to be issued for the seizure of the goods of the party convicted and condemned to pay a fine, the person condemned to the fine, " shall be committed to prison in respect of " such fine remaining unpaid for the period " provided in Schedule D. hereunto an- " nexed "—and the same Ordinance has repealed Articles 113, 114, 115, 116 and 117 of Ordinance 35 of 1852 concerning the issuing of warrants of distress for the seizure of the goods of the party fined.

The learned Counsel has contended that by using the word " recovered " in Ordinance 12 of 1882, the Legislature intended to revive the old system of recovering the fine.

We think that this argument is unfounded and, that by merely using the word " recovered " instead of " enforced " as was suggested by the learned Counsel, the Legislature could not have intended to revive the old system and re-enact those Articles expressly repealed by Ordinance 7 of 1873. We are clearly of opinion that when the Magistrate proceeded in this case to issue a warrant of commitment for the recovery of the amount of the recognizance the non payment of which is assimilated by Ordinance 12 of 1882 to the non payment of a fine, that he has properly construed the Ordinance.

This law may be a very harsh one. I certainly for my part consider it as a very harsh law, but it was considered by the legislature in 1882 that is was necessary to pass it and we have only to declare what the law is, and not to amend it.

There is, however, I must say what may to a certain extent be called a remedy to the harshness of the law, in the 2nd. paragraph of Article 10 of Ordinance 12 of 1882 and if the parties who are now before the Court had applied to the Magistrate and had shown good cause in virtue of the second paragraph of Article 10, the Magistrate might have been satisfied with the cause shown, but it does not appear that they have chosen to move under the second paragraph of that Article. That second paragraph runs as follows : " Provided that it shall be lawful " for such Court or Magistrate upon suffi- " cient cause shown to rescind any such " order." In this case the prisoners who have signed the recognizance have not, to all appearances, availed themselves of this provision, there is no affidavit saying that they have done so—there is no entry in the papers before the Court that they have tried to obtain from the Magistrate a rescinding of the order which was given.

In the second branch of his argument the learned Counsel stated that there were two sets of warrants of commitment before the Court and that the first warrants were insufficient—they did not contain the necessary elements to allow the Court to determine whether the prisoners were legally detained or not and that with regard to the second warrants, although the same objections could not be made entirely against them as were urged against the first warrants, they had been issued too late after the case had been put on the list, by the issuing of a writ of *habeas corpus* or, at all events, had been filed after the sitting of the Court had begun. Those last two warrants appear to be dated the 19th March, they have been placed under the eyes of the judges when the case was called — that is to say at about one o'clock yesterday.

Now, the question is to know whether it was too late at that time to file those warrants as a return to the writ of *Habeas Corpus*. We have not a written return before us.

According to the practice in England, there is generally a written return, but we were told by the learned Substitute that it is not the practice here. Cases such as this are not of frequent occurrence—cases are very rare in which writs of *habeas corpus* are issued by this Court, so it is not possible for the Court to state what is really the practice with regard to the written return. We have however, as a return the production of the warrants of commitment. Now according to what appears to be the jurisprudence both in England and in Mauritius, it is possible to file an amended warrant of commitment before the case is heard and it is even possible to amend the return but not the warrant of commitment after the return has been made. We read in Paley's "Summary Convictions" in the chapter of *Habeas Corpus* that "after the return is "put in and read, it is considered as filed but "the Court may still amend it although the "commitment cannot be amended."

In cases which have been quoted to us, such as the case of Punchand and Gunness, page 51—1863, this Court has decided that a second warrant, an amended warrant of commitment may be put in till the return of the writ is made, and if the latter warrant is good the Court will not look at the former warrant. In this case as there is no written return filed and as the practice with regard to the written return appears be rather unsettled, we think that the moment of the return of the writ was when the case was called before the Court and when the documents which were tendered to justify the detention of the prisoners were filed and produced to the Judges. Therefore we hold that in this case the second warrant of commitment which is before the Court has been produced before the return of the writ which was issued by the Court, and we have now to consider whether that warrant is sufficient in order to justify the detention of the prisoners.

The second warrant of commitment against against Bedessee runs as follows: "Where- "as on the 25th day of February 1888 "one Bedessee and one Nazarally did "subscribe, &c., &c., &c."

.....

The second warrant against the other prisoner is in exactly the same terms. It was argued that even the second warrant was hardly sufficient as an equivalent of a conviction.

This case is certainly one of quite a special nature. We are in presence of a law which assimilitates the person who has signed a recognizance in favor of a party charged who does not appear to answer the charge, to a party who has been convicted and condemned to a fine, but it can hardly be said that the prisoners have been found guilty of a criminal offence either under the Penal Code or under any Ordinance. However, the Legislature has considered it expedient to enact that the party who has signed a recognizance and who is unable to pay at once the amount of it, when the party on behalf of whom that recognizance has been signed leaves default is to be dealt with as an offender by the Magistrate who may commit him to jail immediately—so the warrant of commitment should contain only the statement of the facts which are necessary to constitute the special offence according to the special ordinance in this matter. Now when we read that warrant, we see that the Magistrate has mentioned the law under which he has acted, and the reason why these parties have under that law been committed to jail, we therefore think that the warrant of commitment contains for this special case sufficient elements to show that there has been no illegallity committed by the Magistrate and that the law which he had to apply has been complied with as is required by certain of its provisions. It has also been contended

that there is nothing to show that the prisoners were present at the moment when the recognizance was estreated and it was argued that it was certainly very hard that men should be condemned by default to be imprisoned when they had not even been called before the Magistrate to show cause why they should not be imprisoned in default of paying the fine, but when we read Article 10 of Ordinance 12 of 1882 we see that the Legislature has not required the presence in Court of the party who has signed the recognizance at the time the recognizance is estreated—Article 10 runs as follows : " In case the recognizance be " conditional for the appearance of a party " before a District Court or Magistrate that " the said party may be put on his trial or " on an examination as to an offence charged " against him or that he may produce " any minor or goods and the said " party shall make default therein, the said " Court or Magistrate or the person law- " fully holding his office may, *without* " *further process* to that effect, order the " said recognizance to be forfeited and " the amount thereof to be recovered."

So that according to this Article, when the party on whose behalf the recognizance has been signed leaves default the Magistrate, according to the Ordinance, may without further process to that effect " order the said recognizance to be forfeited."

It is not necessary that he should summon the parties who have signed the recognizance to appear before him to show cause why the recognizance should not be estreated, it is sufficient that the party for whose appearance it has been signed leaves default to entitle the Magistrate — and it may be considered as an imperative enactment upon him that he should " without further process " immediately estreat the recognizance " and order the amount there- " of to be recovered ". Now the Magistrate might according to the terms of this Ordinance read together with Ordinance No. 7 of 1873, Article 2, have immediately issued a warrant of commitment against these men, but it appears from the warrant of commitment which we have before us and also from other documents in the record, that there was first a warrant of arrest issued against the men, they were brought before the Magistrate by means of that warrant of arrest and there, from what the Magistrate declares in the warrant of commitment, those men have been heard by him. If any reasons were given by them it would appear that they were not found sufficient by the Magistrate but it was after having heard them that he issued the warrant of commitment against them for six months, as he is entitled to do under Ordinance No. 7 of 1873. It cannot be said, therefore, that those men were not given an opportunity of paying the fine before they were committed to jail, there is no affidavit made on their behalf that they offered to pay the fine or that they asked for time to pay the fine or that they offered sureties for the payment of the fine—we have nothing before us, resulting either from affidavits or any other documents, to show that there was any intention on their part to pay the amount of the recognizance considered by the law as a fine. We must therefore hold in these circumstances, that it does not appear that the Magistrate has acted illegally and we must on that account maintain the warrants of commitment which are before us as sufficient to justify the detention of the prisoners.

There was something said in this case about the record. As a rule, in matters of " *Habeas Corpus* the writ being issued to the jailer, the record is not brought before the Court —it is not as in a case of *Certiorari* in which the writ is issued to the Magistrate and the record is brought before the Court—

but in this case it appears that there was a motion made to the effect that, at the same time that the writ was issued to the jailer, notice of the writ should be given to the Magistrate and that the record should be brought before the Court. We have therefore the record before us, but the Court has not generally in cases of "habeas corpus" to look into the record, the only document which the Court has before it in such cases is the warrant of commitment itself (See Paley Chap. IV).

It was however stated that certain entries in the record now in Court were badly made, or that they were insufficient. Yet we see in the record that the Magistrate has made an entry on the 12th March with regard to the recognizance which was estreated by him when the accused left default. There were also certain entries that were made on the "Jacket" of the record showing that the prisoners were arrested and committed to jail. It was said by the learned Counsel that those entries were in the handwriting of the clerk and were only initialled by the Magistrate. If we had to look at the record, and not at the warrant of commitment only as the most important document in a case of *habeas corpus*, we might perhaps have found that the record was not kept with the care and regularity with which it should have been kept in a matter which is of a quasi criminal nature, but the critiscisms of the Counsel for the prisoners have no bearing upon the real points at issue here, and from the warrants of commitment in this case we find that the prisoners are legally detained. However we must take this opportunity of requesting District Magistrates to keep their records as complete as possible, their entries should be as full as possible with regard to every thing which takes place before them. In this case for instance, we have no doubt that the warrant of commitment contains the whole truth as to the appearance of these men after they had been arrested and brought before the Magistrate before they were committed to jail, but it would certainly have been better if the record had contained a complete entry as to what took place after the arrest of these men and when they appeared before the Magistrate.

The prisoners will be taken back to jail.

SUPREME COURT

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ERROR — MISNOMER — TESTAMENT — ELDEST CHILD—DEAD CHILD—SUBSTITUTION OF NAME ALLOWED.

By a last will and testament, a property was left to the six children born from the marriage of A. with B.

At the time the testament was made another child born of the same marriage was dead, but his name appeared in the testament among those of the six living children.

It was contended by the defendant that that name had been inserted by mistake for that of the eldest living child.

The Court considered.

1o. *That it was for more likely that the testator should have confused the names of two children, than he should have forgotten the death of one.*

2o. *That the eldest child, alleged to have been born from another man, having been legitimated by the marriage of A. and B. was, in law, born from the union of A. and B.*

3o. *That the name of that eldest child should by substitution be inserted in the testament for that of the dead child.*

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JEANNOT,—Plaintiff.

and

FONTENAY & ors,—Defendents.

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Before

His Honor Sir E. J. Leclézio Kt.,—Chief Judge.

and

His Honor F. C. Williams,—Puisne Judge.

—

Y. Jollivet,—Counsel for Plaintiff.
H. Thatcher,—Attorney for the same.

G. Guibert,—Counsel for Defendent.
A. Betuel & ors.,—Attorneys for the same.

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Record No. 24,185.

22*nd. March* 1888.

The question here is, as to the interpretation of a will. Jean Concisse by will of 6th October 1860, left his property for her life to his reputed daughter Augustine Tuyau, the woman who unquestionably was the mother of one Jean Gustave Jeannot, in whose rights is the defendant Fontenay. After Augustine Tuyau's death, the will directed that the testator's property should be divided in bare ownership amongst six of her children whom the will describes as "*six enfants issus du mariage du sieur "Alcide Jeannot avec Augustine Tuyau.*" Now Augustine Tuyau had only six children living, as the duly declared issue of her marriage with Alcide Jeannot, at the date of the will. One of these six living children, however, and the eldest, was Jean Gustave Jeannot, who is not mentioned by name in the will with the other five, but, in place of him (as is contended for the defence) one Alcide Jeannot is mentioned as first of the six, a son who certainly had been an issue of this marriage, but who had died many years before, when only a year old; a fact which we find to have been perfectly well known to the testator.

We are asked to decide whether, in mentioning Alcide Jeannot as the first, and presumably eldest, of his daughter's six children by Alcide Jeannot the father in the will, the testator did or did not mean to name Jean Gustave Jeannot, who was then in fact, the eldest of the six living children declared to be "*issus du mariage de "sieu r Alcide Jeannot avec Augustine Tuyau.*' We think that this contention is reasonable and well founded. It was urged for the plaintiff that the testator could not have meant to describe Gustave Jeannot as "*issu du mariage*" of his mother with "*sieur Alcide,*" because as a fact, Jean Gustave was, in the full knowledge of the testator, the fruit of an early "*liaison*" between Augustine Tuyau and another man. But this consideration does not weigh with us, in view of the legitimation of Jean Gustave Jeannot and his acknowledgement by Alcide Jeannot the father (now dead) as issue of his marriage with Augustine Tuyau, in their act of marriage of 3rd September 1853.

The status of Jean Gustave Jeannot, in face of the document, was indisputably at the date of Jean Concisse's will, that of the eldest of the "*six enfants issus du mariage du "sieur Alcide Jeannot avec Augustine Tuyau.*'; As a matter of probabilities, it seems to us far more likely that the testator should have confused the names of two children, than that he should have forgotten the death of one.

Taking this view of the case, we think we may employ the power which the Court no doubt possesses to declare that the name of Jean Gustave Jeannot should be read by substitution for that of Alcide Jeannot in the testator's will.

The action is consequently dismissed with costs.

SUPREME COURT

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TRESPASS ON PRIVATE PROPERTY—ACTION IN DAMAGES—DEMURRER—RIGHTS AND DUTIES OF A CORPORATION — COURTS OF LAW TO DECIDE LEGALITY OF ACTS — FORMIDABLE EPIDEMIC—DIFFERENT VIEWS TOUCHING POWER OF SANITARY AUTHORITIES UNDER ORDINANCE 8 OF 1874.

Plaintiff sued defendants (a Corporation) in damages, for having "inter alia" put the camp of his Estate, with an area around it, in quarantine, cut down trees and erected huts on the land, and stopped the water of a canal used for irrigation purposes.

Defendants urged as preliminary exceptions.

(a) *That they could not be sued in this matter, in as much as they and their officers had acted under orders of the Executive.*

(b) *That plaintiff had, practically, appealed already to the Executive, against the resolutions of Defendants and was therefore now precluded from raising an action at law.*

(c) *That their act was legitimate as it was absolutely necessary in order to prevent the spread of a contagious disease.*

Anent (a) and (b), the Court unanimously held :

1o. *That the Defendant, being a corporation could sue and could be sued, and that, as the acts complained of were committed by the officers of the Defendants acting ostensibly for the Defendants, the latter were primarily responsible.*

2o. *That the contention of plaintiff being that the acts complained of were not in conformity to law, notwithstanding the approval of the head of the Colony, the Supreme Court was the only authority to decide the question.*

Anent (c) the majority of the Judges were of opinion, that when a person is infected with a contagious disease which may be the primary cause of an epidemic of a formidable nature, it is the right and the duty of the constituted authorities to interfere for the protection of society, and if it becomes thereby absolutely necessary to place some restraint on individual freedom, or even the enjoyment of private property, no indemnity can be claimed (Art. 42 and following of Ordinance 8 of 1874.)

They considered that the liability of the defendants to damages depended, therefore, on the nature of the facts proved, and allowed plaintiff leave to usher in evidence to establish those facts.

One of the Judges, however, was of opinion, that nothing in Ordinance 8 of 1874, did, specifically or inferentially, authorise the temporary appropriation of a private person's land, even with the view of checking the progress of an epidemic.

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COLIN,—Plaintiff.

and

THE GENERAL BOARD OF HEALTH,—Defendants.

—

Before

His Honor A. MURE,—Puisne Judge.
His Honor F. C. WILLIAMS,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

P. L. CHASTELLIER,—Counsel for Plaintiff.
A. J. COLIN,—Attorney for the same.

HONBLE. L. ROUILLARD, Substitute Procureur and Advocate General,—Counsel for Defendants.

J. GUIBERT,—Attorney for the same.

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Record No. 24,024.

29*th. March* 1888.

Towards the end of the month of March of last year, cases of a contagious disease which the officers of the General Board of Health certified to be small pox, occurred in the camp of "Pierre Fonds", belonging to plaintiff.

Some time previous, Proclamation 24 of 1887 had declared, in virtue of the powers conferred by Article 42 of Ordinance 8 of 1874, that the Colony was threatened with a "formidable" epidemic.

On the 29th March, the General Board of Health passed, under Articles 43 and 44 of Ordinance 8 of 1874, the following resolution: "That the camp or range of huts of "Palma" "and "Pierre Fonds" with a sufficient "area around, to prevent the diffusion of "the disease, and which will be indicated "by Dr. Hall, be kept in strict quarantine "until further orders."

This resolution was approved on the first of April by His Honor the Officer Administering the Government, in Executive Council. It does not appear to have been laid before the Legislative Council; but, on the 5th April, other resolutions, embodying that of the 29th March were passed by the General Board of Health, approved by His Honor the Officer Administering the Government and laid, in conformity to law, before the Legislative Council.

These resolutions were as follows:

"That the camps of "Palma" and "Pierre Fonds" with a sufficient area "around to prevent the diffusion of disease, "do form one quarantine station including "that part of the "Pierre Fonds" Estate "lying between the "Pierre Fonds" and "Palma" camps."

"2o. That all the persons residing in this "area, which is defined as the "Palma" "and "Pierre Fonds" camps, be kept in "strict quarantine until further orders."

"3o. That the high road from the upper "entrance to Palma Estate, as far as, and "including the chinaman's shop on the road "leading to Cressonville down to the river, "be quarantined."

The officers of the General Board of Health, carrying out the resolutions of the 29th March, proceeded, as alleged in the declaration, 1o. to put in quarantine the camp of the Pierre Fonds Estate with an area around it, which included the bullocks' shed, the manure heap and the carts of the Estate; 2o. to take possession of about one acre of land where they cut down trees and erected huts; 3o. to use the roads of the estate for their own carts, cutting grass and acacia trees; 4o. to stop the water of a canal used for irrigation purposes.

Subsequently, both the camps of "Pierre Fonds" and "Palma" and the intermediate ground were made but one quarantine station, about sixty acres in extent, including main dwelling house, stores, vanilla and coffee plantations and part of sugar cane plantations.

The plaintiff does not make it clear that all the land forming the quarantine station belongs to "Pierre Fonds" estate. He is not, as we understand, the owner of "Palma" Estate. This, however, has no importance with regard to the point of law which the Court has now to decide.

The defendants, in their pleas, deny generally the facts of the case. They have also pleaded that they never authorized their officers to stop the water of the canal, and that Mr. Bonieux, the plaintiff's manager, had allowed them to erect huts on "Pierre Fonds" estate. But their main ground of defence is that they acted legally, in conformity to the resolutions passed by the General Board of Health and approved by the competent authorities, and, on that broad ground, they contend that no indem-

nity is due by them to plaintiff. This is the issue at present before the Court.

Before we examine the law in support of this contention of the defendants, it will be more convenient to dispose briefly of two preliminary objections raised by the defendants' counsel. He argued in the first place that the General Board could not be sued in this matter, in as much as the General Board and its officers had, all throughout, acted under the orders of the executive and therefore could not have incurred any responsibility.

We do not adopt this view of defendants' position. In virtue of Ordinance 8 of 1874, the General Board of Health is a corporation owning property, with power to dispose of it, having its officers and servants, authorized to sue and be sued like all corporate bodies. Under Article 45 of Ordinance 8 of 1874, whenever resolutions are passed by the General Board, they are to be carried out by the local authority which, according to the interpretation clause of the same Ordinance, means in the rural districts, the sanitary guardian. It may be true that in this case, the officers of the Board were, in a certain measure, under the control of the executive; this is of no concern to plaintiff; the acts complained of were committed by the officers of the Board acting ostensibly for the Board. It is the Board which must be primarily responsible, (see Hill v. Metropolitan &c.) Another objection was that the plaintiff having lodged in the hands of the Officer Administering the Government his protest against the resolutions of the General Board, practically appealing against them, was precluded from raising in Court an action against the Board of Health—The answer of the plaintiff on this point is conclusive. In the first place, he always reserved to himself in his petitions the right of suing the defendants in the proper Courts, in case of refusal. Besides, the contention of the plaintiff being here that the powers assumed by the Board of Health were not in conformity to law, notwithstanding the approval of the head of the Colony, the Supreme Court is the only authority by which this question can be decided.

Turning now to the main question between the parties, namely: whether the plaintiff is entitled to indemnity for the acts alleged in the declaration to have been committed under the authority of the General Board, we find that the powers of defendants are derived from Articles 42 and seq. of Ordinance 8 of 1874 which may be summarized as follows:

Whenever any part of the colony is threatened with or is affected by any "formidable" epidemic the Governor by Proclamation puts in force paragraph 3 of Ordinance 8 of 1874, which empowers the General Board of Health to issue orders and regulations...for any such matters or things as may to them appear advisable for preventing or mitigating such disease.

It is therefore the duty of the General Board to prevent the spread of the contagious disease with reference to which the proclamation has been issued. How can a contagious disease be prevented from spreading? The most obvious measure is the isolation of the persons affected by the disease and of the persons who have been in such immediate contact with the infected persons that the danger of their becoming infected in their turn is imminent. Had the General Board confined its action to these measures only, no cause of complaint would probably have arisen,—but, as the plaintiff alleges, not only did the Board of Health or its officers, sequester a certain number of persons, preventing all communication between them and the outside world, but the General Board also temporarily took possession of land and buildings belonging to a third party—it must then show

that the persons occupying the premises were in such a condition as above stated that the interference of the Board was an absolute necessity.

If it was so, then we must hold that the action of the General Board has been exerted in conformity with the true purport of Articles 42 and following of Ordinance 8 of 1874, and is justifiable. We further hold that in such case no indemnity is due. When a person is infected with a contagious disease which may be the primary cause of an epidemic of a formidable nature, and here the disease which had made its appearance at "Pierre Fonds" is described as small pox, that person becomes a danger to others. It is then not only the right but the duty of the constituted authorities to interfere for the protection of society and even if this interference, the extent of which is determined by sanitary regulations, can only take place by some restraint being put on individual freedom, or even, the enjoyment of one's property, it is legitimate and no indemnity can be claimed. It can hardly be contended that if a person affected with small pox is prevented from moving from place to place, spreading infection in all directions, this interference with the personal freedom of the patient can give rise to any indemnity.

But it is obvious that the cases in which these deviations from the fundamental principles of society can be justified, must be viewed with great care and caution. A difference must be drawn between the cases of actual infection and those in which infection is, not a reality, but a contingency more or less remote, which may even become mere matter of opinion. If the General Board of Health, which, in this Colony, is the constituted authority whose duty it is to prevent the spread of contagious diseases, is advised that a certain area, around an infected place, is to be "quarantined" not on account of any actual infection, but as a mere matter of prudence, the persons whose property and freedom of action are interfered with in this area, may have just grounds of complaint. In our opinion, it would be no defence to an action in indemnity that the regulations of the Board of Health under which an area round an infected place was made a quarantine station, were approved of by the Head of the Colony and afterwards laid before the Legislative Council where no objection was raised.

The liability of defendants to damages will therefore depend on the nature of the facts proved and, as it is indispensable that these facts should be fully known, we allow the plaintiff to usher in the oral evidence of which notice has been given, and to the defendants, a joint probation.

Costs reserved.

(Sd.) A. Mure J.
J. Rouillard J.

29.3.88.

JUDGMENT

Delivered by His Honor Mr. Justice Williams in the same case.

The important question at issue in this case is, as to how far regulations made by the General Board of Health of this Colony under the powers of Ordinance No. 8 of 1874, will justify the Board in interfering with the rights of private ownership of immoveable property in Mauritius.—The plaintiff is owner of "Pierre Fonds" sugar estate, and it is admitted that, in the months of March, April and May last year, upon the suspicion of the existence of small pox upon the estate, the General Board of Health, acting under the powers of para. 3, S. 44, clause 4, of the Ordinance, took forcible possession of a considerable area of the plaintiff's land, cut off his water supply, and for a period of some six weeks, dealt with the sixty and odd acres of land of which they had thus taken pos-

session, *invito domino*, by their agents, as if the lands were in fact their own. A preliminary objection to the action is that the General Board of Health of Mauritius is a privileged body and cannot be sued. I think that this objection is sufficiently met by S. 14 of the Ordinance constituting the Board, which section declares it to be a corporation, possessing a seal, and capable of acquiring and disposing of real property in its corporate capacity. Possessing corporate rights, I think it is also subject to corporate liabilities, among others to that of being sued as well as of suing.

Part 3 of the Ordinance is designed to deal with the special case of serious and epidemic diseases occurring in the community, and has the force of law only under proclamation of the Governor in Executive Council. S. 44 of part. 2 empowers the Board, by orders and regulations, to provide for certain special contingencies, among others, by clause 4, " for any such matters or things as may to them appear advisable for preventing or mitigating " the prevailing disease. For the purpose of my judgment upon the application before us, which is practically in the nature of a demurrer to the plaintiff's right of action, it may be assumed that the Board of Health was properly armed with the powers of this section, and that its proceedings were regularly taken by its agents acting under its instructions and in the exercise of those powers.

It is the contention of the plaintif that, even under such circumstances, the Ordinance No. 8 of 1874, in the sub-section of it just quoted, does not justify an interference with the rights of private property such as are secured to the inhabitants of this colony by what was called in the argument the " Common Law "—but by what is really the written Law of the Civil Code of France, as embodied in its sections 544 and 545. For the Crown, on the other hand, it was urged that, under the powers of the Ordinance, the Board possesses unlimited rights to deal with private property in the Colony without according to the dispossessed proprietor of such property any indemnity except as an act of grace.

I cannot assent, without better authority than in my judgment has been shown to the Court, to any such sweeping proposition. Articles 544 and 545 of the Civil Code, which should no doubt be read together, embody the following propositions : first, that the right of enjoying and disposing of things in the most absolute manner, which constitutes property, is qualified by the *proviso* that they may not be put to a use prohibited by law ; and secondly, that individuals cannot be constrained to cede their property except for the good of society, and then only after the previous payment of a fair indemnity, No doubt, in this Colony, where these articles of the Code have force, their application can be modified by local ordinances, as is the case in France. But it is, in my view, impossible to contend seriously that these articles,—establishing the inviolability of private rights of property, so long as those rights are not exercised in antagonism to the law of the land, or so long as the interference with them is not justified by considerations of public utility (in which case the interference must be compensated by a previously paid indemnity) — are repealed and abrogated by a simple sub-section of an Ordinance empowering a public body to provide " for any such matters or " things as may appear to them advisable " for checking the spread of disease. Who can say that the plaintiff in the case before us, was putting his private rights of property to a use prohibited by law ? He was simply cultivating his estate. This case is not upon all fours with that of the Heirs Rougé versus the Government of Mauritius, in

which the plaintiffs may be regarded as virtually seeking compensation for a penalty inflicted upon them for the infraction upon their own property of an express and specific Ordinance of the Colony. There it was held, and no doubt rightly, that as they were putting their proprietarial rights to a use prohibited by the law of the land, the plaintiffs were debarred from taking legal action for interference with those rights; here on the contrary, there is a serious interference with private rights totally unjustified by any allegation of illegality in their exercise. So much for Article 544 of the Code. But has there been a cession of proprietary rights as contemplated by Article 545 of the Code, to call for a prior indemnity? It surely cannot be said that to isolate sixty acres of land appropriated to the purposes of an estate and to stop the water supply of an estate with growing crops upon it for a month or six weeks, is not a serious interference with the rights of property, though it may not amount to "confiscation" which was the strong term used by the counsel for the plaintiff. I admit the force of the argument that, under the stress of an epidemic it might be fatal to postpone drastic action until the terms of an indemnity could be arranged. I admit that exceptional circumstances might occur which, upon the principle *salus populi suprema lex*, would justify in the common interest any and every exercise of authority upon the part of the governing power. But part 3 of the Ordinance under which action was taken and is sought to be justified, in the case before us, was expressly framed to meet such an emergency as the one now in question, and it should have embodied clear and specific powers to deal with private property in such a manner as it is alleged that the defendants by their agents have dealt with the private property of the plaintiff. The case of a temporary appropriation of a private person's land with the view of checking the progress of an epidemic would seem to be almost parallel to the case of appropriating private property temporarily for purposes of defence in case of an enemy's invasion. But, in providing for that contigency, the French authorities did not overlook the sections 544 and 545 of the Civil Code, but authorized the temporary appropriation under such circumstances, by special legal enactment. (Art. 76 of the French Law of 3 May, 1841.)

The framers of the Mauritian Ordinance No. 8 of 1874, should have had the courage to do the same thing, specifically, by means of their act. It has not been specifically done, nor even inferentially, for I cannot admit that authority "to provide for matters "and things advisable for preventing or "mitigating disease" was ever intended to cover a serious and continuing trespass upon private immoveable property. Seeing that a special section (46) of part 3 of the Ordinance was deemed necessary to justify an entrance upon such private property for *mere purposes of inspection*, I cannot be convinced that a vague sub-section, authorizing the Board to provide for matters and things advisable to check disease, was intended to legalize such an extensive trespass as the one set forth in the present declaration.

I am of opinion that the action lies, and that the application to the Court in this case should be allowed.

SUPREME COURT

INFORMATION—CONTENTS OF— GUILTY KNOWLEDGE—INFORMATION CONTAINING WORDS OF STATUTE, SUFFICIENT — GUILTY KNOWLEDGE INFERRED FROM CIRCUMSTANCES.

A party convicted for having made use of a false pair of scales, appealed to the Supreme Court, chiefly on the ground that the Information did not contain any averment as to the knowledge of the accused that the scales were false.

By the Court:

1o. *An information which embodies the words of the statute and nothing more is good in law.*

2o. *The facts of the case justified the Magistrate in finding that the accused knew the scales were false when he used them.*

Appeal dismissed. Costs.

—

BABA,—Appellant.

and

QUEEN,—Respondent.

—

Before

His Honor Sir E. J. Leclézio, Kt.,—Chief Judge.

and

His Honor J. Rouillard,—Puisne Judge.

—

W. Newton,—Counsel for Appellant.

H. Bertin,—Attorney for the same.

The Hon. L. Rouillard, Substitute Procureur General,—Counsel for Respondent.

J. Guibert,—Attorney for the same.

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Record No. 553.

29*th. March* 1888.

The appellant was condemned on the 17th. February last to one month imprisonment and a fine of Rs. 60 for having on the 10th. February last made use of a false pair of scales.

As a first ground of appeal, it was argued that although Mr. Lebreton, an Internal Revenue Officer gave before the Magistrate evidence showing that the scales produced in Court were false, there was no evidence that the scales were then in the same condition as when the contravention was taken. As a matter of fact the cause of the scales being false was the removal of a piece of chain from one of the scales and the learned Counsel for the appellant contended that it was incumbent on the prosecution to prove that the scales were false at the time when the alleged contravention was committed.

After perusal of the record, the Court feels bound to state that the evidence before the Magistrate might have been more direct and definite with regard to the condition in which the scales were at the time when the alleged offence was committed.

The Court cannot however go the length of declaring that the evidence was so incomplete that the Magistrate was not justified in considering the case.

Two of the witnesses called by the prosecution identified the scales produced in Court as those which were seized in the shop of appellant. We assume this statement to imply that the scales were in the same condition as when the witnesses saw them on the first occasion—the more so, as, before the Magistrate, so far as we can judge by the examination of the witnesses, not even a hint was attempted that the scales might have been tampered with.

In fact, the defence rested on a different ground: viz: that the accused had used not the scales produced, but other scales.

The learned Counsel for the appellant next argued that in as much as the offence charged against his client was punishable by imprisonment for a maximum period of six months in addition to a fine, it amounted to a misdemeanour. He further contended that in misdemeanours, guilty knowledge was one of the essential ingredients of the offence and he called the attention of the Court to the fact that the information before the Magistrate did not contain any averment as to the knowledge by the defendant that the scales were false.

It seems to the Court that an information which is framed so as to embody the words of a statute and nothing more, is good in law.

As for the guilty knowledge, the Court thinks that the Magistrate was fairly entitled to infer it from the circumstance that the witness who purchased the rice from appellant, found the scales ready prepared for use, with the weights already put in one of the dishes, which prevented him from detecting that the scales were not even.

We therefore have no other alternative but to dismiss the appeal with costs.

SUPREME COURT

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APPEAL FROM SEYCHELLES COURT—MORTGAGE CREDITOR — TENDER OF DEBT'S AMOUNT BY PURCHASER, TIERS-DÉTENTEUR,—REFUSAL OF CREDITOR TO DISCHARGE TIERS-DÉTENTEUR—LIABILITY OF TIERS-DÉTENTEUR—HIS RIGHT TO DISCHARGE—ACQUITTANCE OFFERED NOT SUFFICIENT— JUDGMENT REVERSED—COSTS.

The purchaser of an immoveable property tendered to a mortage creditor the amount of his claim, and required an acquittance to the effect that he, the said purchaser, tiers-détenteur, was discharged up to that amount.

The mortgage creditor consented to give an acquittance but refused to state that he discharged the said "tiers-détenteur", contending that there was no "vinculum juris" between them.

Held by the Supreme Court, on appeal from District Court of Seychelles.

1o. *That whether the purchaser, tiers-détenteur, (appellant) had taken charge or not in his deed of acquisition of the mortgage debts, he under Art. 2167 C. C., would be liable for such debts, until they were satisfied.*

2o. *That, consequently, when the tiers-détenteur paid any such debt, he was entitled to ask for his discharge.*

3o. *That such a discharge was not mere surplusage here, as it was necessary for the erasure of the "Inscription d'office" taken at the time of the transcription of the deed of sale to the tiers-détenteur.*

4o. *That as the acquittance offered by the creditor (Respondent) did not contain any reference to the said deed of sale, the conservator of Mortgages might have raised difficulties which would have entailed upon the tiers-détenteur inconvenience and further costs.*

The appeal was sustained and the real tenders of appellant were validated, with costs.

—

HAJEE ABDOOL RASSOOL,—Appellant.

and

FLOWERDEW,—Respondent.

—

Before

His Honor SIR E. J. LECLÉZIO KT.,—Chief Judge.

and

His Honor JOHN ROUILLARD,—Puisne Judge.

—

W. NEWTON,—Counsel for Appellant.
H. BERTIN,—Attorney for the same.

L. CHASTELLIER,—Counsel for Respondent.
DE CHAZAL,—Attorney for the same.

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Record No. 895.

11*th. May* 1888.

On the 10th September 1887 Mr. and Mrs. Moulinié sold to Hajee Abdool Rassool a property situate at Seychelles, for the sum of eighty thousand rupees. That property was burdened with two mortgages for Rs 35,000 and Rs 2,000 respectively, held by William Flowerdew. The latter mortgage was payable by anticipation. In the deed of sale to Hajee Abdool Rassool, he took charge to pay to Flowerdew the two claims above set forth and as the mortgage debt of Rs 2,000 was payable by anticipation the agent of Hajee Abdool Rassool on the

1st December 1887 caused real tenders for that sum to be made by an usher, accompanied by a notary, who presented to Flowerdew a notarial discharge for signature. This discharge, Flowerdew refused to sign, offering in lieu thereof a document which chiefly differs from the document tendered by Abdool Rassol by the omission from the second document of the clause that Flowerdew discharged Abdool Rassool "tiers-detenteur." Hadjee Abdool Rassool, insisting that it was his right to obtain Flowerdew's signature to the deed tendered to him, as it stood, summoned Flowerdew before the District Court of Seychelles, to show cause why the "offres réelles" made to him on the first December 1887, should not be validated. On the District Judge ruling that Flowerdew was justified in refusing to be paid, under the conditions above related, the present appeal was made.

The document objected to runs as follows: "……Lequel (Flowerdew) sans entendre en "aucune façon déroger aux droits, actions, "hypothéques et inscriptions, résultant en "sa faveur, contre M. et Mme. Moulinié, "a par ces présentes reconnu avoir reçu et "touché en bonnes espèces de monnaie "ayant cours en ces Iles comptées et déli- "vrées à la vue du notaire et des témoins "soussignés……de M. Hajee Aga Abdool "Rassool……payant sans subrogation en "l'acquit de M. et Mme. Moulinié sus "nommés……de laquelle somme de deux "mille Roupies M. Flowerdew quitte et "libère entièrement et definitivement M. "et Mme. Moulinié et le dit Sieur Abdool "Rassool tiers détenteur."

The ground on which the District Judge of Seychelles proceeded in order to rule in favour of defendant is that there was no "vinculum juris" between Flowerdew and Abdool Rassool and further that there has been simply an indication by plaintiff's (now appellant's) vendor of a person towhom payment is to be made of a certain portion of the sale price without acceptation by the latter. The learned District Judge then proceeds as follows: "It results from the "document produced that the person ten- "dering was not the tiers détenteur of the "property, tendering in his own name and "interest for the purpose of clearing his "property of mortgages, but the purchaser "paying on behalf and by direction of the "vendor to a debtor of the latter."

We are unable to understand the distinction thus made. There seems to have been a misapprehension as to the meaning of the word "tiers détenteur" in the notarial discharge. Whether the appellant Rassool had taken charge or not in his deed of purchase of certain debts secured by mortgage, which encumbered the property and which he agreed to pay, he was, to all intents and purposes, a "tiers détenteur" whose position is thus defined by Article 2167 C. C. "Si le tiers détenteur ne "remplit pas les formalités qui seront "ci-après établis pour purger sa propriété, "il demeure par le seul fait des inscriptions, "obligé comme détenteur à toutes les dettes "hypothécaires."

The appellant being bound not only by his deed of purchase, but independently of any stipulation to that effect, to pay certain debts which burden his property, it follows that when he pays any of these debts to the holder of the mortgage, he is entitled to ask for his discharge.

The law seems to be thus understood in France. In a form given in a well known book the "Formulaire du notarial" by Clerc the "tiers acquéreur or "détenteur" paying a privileged creditor of the Estate under circumstances analogous to the present, is given his discharge in words similar to those found in the deed before us (quitte et libére.)

That clause of discharge is not mere sur-

plusage; it is required for the purpose of erasing the "inscription d'office" taken at the time of the transcription of the deed of sale by Moulinié to Rassool.

It is quite true that the deed of acquittance which the Respondent in his turn offered to sign, might have had indirectly and by way of inference the same effect, but it may be observed that the deed of purchase, which had been transcribed at Seychelles, was not even referred to in the deed of acquittance proposed to Rassool, and if difficulties had been raised on that account by the conservator of mortgages for the erasure of the "Inscription d'office," Rassool might have been exposed to some inconvenience and further costs. So we cannot hold that he was bound to accept it. But even admitting that he might without risk have accepted it, the deed of acquittance tendered by Abdool Rassool did not set forth anything beyond what the latter was strictly entitled to claim, and before the district Judge, he simply asserted his rights. It may be remarked with reference to some observations of Respondent's counsel, that the deed of discharge is so framed as to remove all possible danger of a novation of the debt taking place.

The appeal is therefore sustained with costs. The real tenders made by Rassool are validated with costs and the conservator of mortgages of Seychelles is authorized to erase the inscriptions burdening the property purchased by Rassool in so far as the Rs 2,000 tendered are concerned.

SUPREME COURT

—

GUARDIAN AND SUBGUARDIAN—THEIR RIGHTS AND DUTIES—INVESTMENT OF MINORS'S FUNDS —MAUVAISE GESTION—FAMILY COUNCIL.

A subguardian called upon the guardian of a minor to show cause why he should not invest by way of mortgage a certain sum which he (the guardian) was on the point of receiving on behalf of the minor.

By the Court:

1o. *The family council which appointed the guardian and the subguardian did not make it a condition that any act of the administration of the guardian should be made with the concurrence of the subguardian.*

2o. *There is no fact before the Court showing that there is any danger threatened to the minor's funds, nor is there any proof of "mauvaise gestion."*

3o. *Under such circumstances, the interference of the guardian is not justified under our law.*

Rule discharged with costs.

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HOSSEN,—Plaintiff.

and

LEBREUX,—Defendant.

—

Before

His Honor A. MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

W. NEWTON,—Counsel for Plaintiff.
H. BERTIN,—Attorney for the same.

Y. JOLLIVET,—Counsel for Defendant.
H. THATCHER,—Attorney for the same.

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Record No. 24,391.

29*th. May* 1888.

His Honor MR. JUSTICE MURE.

This is an application made by way of a rule calling upon the defendant to show cause "why on receiving payment of a mortgage "claim of Rs. 1599.96 c. with interest, he "should not be bound to invest at once the "said sum by way of mortgage payable at

"the majority of the minors or their "establishment by marriage." The said investment the Rule goes on—"to be made "simultaneously with the receiving of the "funds of the present claim and in presence "of the subguardian of the said minors"—and the reason for that is given in these words "In as much as there is a first rate "opportunity of investing the aforesaid "funds on a first rank mortgage on an "immoveable property situate in this town "of Port-Louis, Pamplemousses Road and "Cotton Street belonging to Dr. Rohan; "and in as much as also there is reason to "believe that the said moneys will be in "jeopardy if received by the guardian and "left without investment in his hands."

This application is made by the subguardian of certain minors Allykhan; and we are in presence of these facts, that the respondent Lebreux was appointed by the family conncil as the tutor of these minors by a large majority of those present thereat. The applicant himself was at the same time also appointed subguardian of the minors. The Council did not make any condition in its deliberations, as between the guardian and the subguardian, that any act of administration of the guardian or tutor should be done with the concourse and with the consent of the subguardian. That was a course which was quite open to them and which they might have followed.

We are, therefore, in presence of a case in which the tutor is appointed to administer the funds of the estate and the question is whether the applicant, in the circumstances of this case, is entitled to interfere with the management of the tutor, to mix himself up in the administration of the affairs of the estate, at this stage of the case, and to see that the tutor on obtaining payment of this money shall have it immediately reinvested, and reinvested on the terms and conditions which are stated in this Rule. Now, there are some things which have been fixed by the law distinctly. In the first place the law, lays down that the subguardian shall act for the interest of the minor when there shall be an opposition between the interests of the pupil and the guardian (C. C. Art. 420). The code further lays down certain specific rules in reference to the conduct of the guardian and subguardian. Under the 470 section, the subguardian may obtain from the tutor other than the father or mother of the minors on the conditions there stated yearly accounts, or accounts, at stated intervals, of the funds in the hands of the tutor. Then under another section of the code (Art. 424), if the guardian disappears or dies and the guardianship becomes vacant, the subguardian does not replace him at once, but is bound under pain of the damages which the minor may suffer to institute proceedings for the nomination of another tutor (Art. 424)—and if the tutor managers badly under another section of the code (Art. 446) the subguardian should apply for his removal by a family council.

But here, we have in this case no allegation made against the tutor, except that he has no immoveable property. We have no facts before us showing that there is any danger to this estate. We have no facts which indicate that there has been anything like what is called "mauvaise gestion." I do not wish to enter upon the principles upon which a subguardian, or "subrogé tuteur" may interfere occasionally in protecting the rights of the minors; but, certainly, here the Court has no reason for interferiug with the management of this tutor.

It is right that I should say, further that intimation of this Rule has been made to a Notary in whose hands the sum of the mortgage paid up has been deposited. Of course, after this judgment has been given, that notice will be null and void, and the

guardian will proceed with the investment of this property in the manner he thinks best. I should suppose that the proceedings which have been taken will show him that he must proceed at once to invest that money, and to proceed warily and cautiously, and to get a good investment and at the same time, a profitable one for the sake of the minors—for it is very clear that he will take no step which may not be called in question by the subguardian, and it is his interest after this litigation, that no question should arise upon which he may be called before the Court.

At present, we have no hesitation in saying that we think this application ought not to have been made and we therefore refuse it, with costs.

On motion of Mr. Jollivet, distraction of costs is allowed in favour of Mr. Attorney Thatcher.

SUPREME COURT

JURISDICTION—PROTECTION OF JUDGE—ACTION IN DAMAGES — CONSUL AT MADAGASCAR—DENIAL OF JUSTICE — JURISDICTION OF SUPREME COURT—11 AND 12 VICT. C. 44—COMMON LAW OF ENGLAND—PRIVILEGES OF JUDGES OF COURTS OF RECORD THEREUNDER—PRIVILEGE EXTENDS TO CONSULAR COURTS—PLEA OF PRIVILEGE— AMENDMENT OF PROCEDURE—COSTS.

The English Consul at Madagascar having been sued in damages for "a flagrant abuse of his judicial powers" and for "a denial of justice" to plaintiff, he pleaded :

(a) *That the Supreme Court of Mauritius had no jurisdiction in suits against the Consul for acts done by him in his judicial capacity.*

(b) *That he had acted "bonâ fide" and without any malice or fraud.*

By the Court :

With regard to (a).

1o. *The Supreme Court of Mauritius has concurrent jurisdiction with the Consular Court of Madagascar in all suits arising in that island between British subjects.* (*Order in Council of* 14 *Feb.* 1869).

2o. *As the Consul could not have been properly sued in his own Court, the action had been rightly entered here.*

Held with regard to (b).

1o. *That although the O. in C. of Feb.* 1869 *had been framed, as argued by Plaintiff, under* 6 *and* 7 *Vict. C.* 94 ; *yet as* 11 *and* 12 *Vict, C.* 44 *was in force at the time, the Consul would perhaps have been entitled to benefit by it, had he been acting on the criminal side of his jurisdiction.*

2o. *That, under the common law of England, the Judges of Courts Record are clothed in privilege in the exercise of their functions, apart from the specific protection of statutes.*

3o. *That it seems reasonable that the privilege thus awarded to English Judges of Courts of Record, should be held to follow them to a Consular Court of Record, where English Law is administered.*

But the Court considered that the plea that the Consular Judge was acting within his jurisdiction must be clearly pleaded.

Leave was given to both parties to amend their pleadings, if so desired, in the light of this decision.

Costs reserved.

PÉLICIER FRÈRES,—Plaintiffs.

and

HAGGARD,—Defendant.

Before

His Honor SIR E. J. LECLÉZIO, KT.,—Chief Judge.

and

His Honor F. C. WILLIAMS,—Puisne Judge.

W. NEWTON,—Counsel for Plaintiffs.
F. ROBERT,—Attorney for the same.

The Hon. L. ROUILLARD, SUBSTITUTE PROCUREUR GENERAL,—Appears for Defendent.

J. GUIBERT "Crown Attorney",—Attorney for the same.

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Record No. 24,284.

29*th. May* 1888.

This is an action brought against Her Majesty's Consul at Madagascar for damages for a tort, consisting, according to the declaration, in a "flagrant abuse of the defendant's judicial powers" and in a "denial of justice" to the plaintiff. The present matter before us is in the nature of an argument upon the pleadings. One of the pleas to this declaration is that the Supreme Court of Mauritius is not empowered by the Order in Council of February 14th. 1869, to entertain a suit against the Consul for acts done by him in his judicial capacity; and another plea is that the defendant has acted in the matter complained of "bona fide" and without any malice or fraud.

The former of these two disputed pleas we do not consider good in law. This Court has undoubtedly concurrent jurisdiction with the consular Court in all suits between British subjects in Madagascar. Section 33 of the Order in Council contemplates suits against the Consul himself, which, of course, must be brought here, as the Consul cannot be sued in his own Court; and there is nothing contained in the Order in Council which excepts the Consul from the ordinary liability of a judicial functionary, under certain circumstances, to be sued. The question for us, however, raised in the second point of the pleadings, is what protection the Consul is entitled to in the exercise of his judicial functions.

The Order in Council of Feb. 4th. 1869, is framed under the Act 6 and 7 V. C. 94, and it was argued for the plaintiffs, that the only protection to which the Consul, sitting as judge, is entitled, is the protection alluded to in § 33 of the Order in Council—that is to say, the protection afforded by 6 and 7 V. C. 14.

Strange to say, however, the protection indicated by that statute was that afforded by a yet older statute 24 G. II C. 44 § 2, which had been repealed at the date of the Order in Council now under notice.

The statute repealing it (11 & 12 V. C. 44) gave a wider protection to Justices than the older statute, and rendered the assertion of "malice or want of reasonable or probable cause" for their judicial acts an essential ingredient in an action brought against them when acting in their judicial capacity. This statute was in force at the date of the Order in Council of 1869; and it might fairly be argued, we think, that the Consul as a judge was intended to benefit by it in view of the non applicability of 6 & 7 V. C. 94 to the protection which it was the object of § 33 of the Order to afford. However, we do not base our judgment on this view of the applicability of 11 & 12 V. to the case of a Consul acting as Justice of the peace.

Both it and the older statute of George II were clearly intended to apply only to cases of limited criminal jurisdiction which was and is the jurisdiction of Justices of the peace in England. But here, in the case before us, the Consular judge was acting, not in his capacity as a criminal judge, but as judge of a Civil Court, and that a Court of Record.

Now, setting aside, for a moment, the question of statutory protection, may it not fairly be argued that, when acting, as the Consul is empowered by Order in Council to act, as judge of a Court of Record, he is entitled to a kindred protection to that which the Common Law of England has always afforded to Judges of Courts of Record in England,

whether of superior or of inferior jurisdiction ? If, as has been said, the English Emigrant carries the Common Law of his country with him to the Colony which he founds—if, as in this case, the common, as well as statute, Law of England, is administered in the Consular Court of Record as between British subjects, shall it be held that the judge administering it is exempt from such safe guards as it lends to his own judicial office and dignity ?

In the case of Taafe v. Downes, the Irish Lord Chief Justice of Common Pleas said : " From James I to George III a great Code of statutes exists in England and Ireland defining the powers of Justices of the peace and officers of the law and revenue. The same laws afford them great advantages, of defence of notice, and of pleading the general issue, without the embarassments of pleading special justifications, and the law remunerated them with double costs if showed without foundation. But where are the similar protections, in the statute Books for the Judges of the Land ?

There are none such ; and the necessary inference is that the immemorial sense of the Legislature is, that that privileged order is protected by peculiar inherent and unquestioned privileges, otherwise they never could have remained unprotected against vexatious litigation upon every frivolous occasions. That is to say, that English judges of *record*, and so of higher authority than mere justices of the peace, are clothed in privilege by common Law in the exercise of their functions, apart from the specific protection of statutes." " The protection in regard to the *Superior* Courts," said de Grey, Chief Justice, in Miller v. Leare 2 W.B.C. 1141 " is absolute and universal ; with respect to the *inferior*, it is only while they act within their jurisdiction." Indeed it has been the province of statute law in case of such judges of record rather to render them liable to action under certain circumstances as an exception to their general privilege than to extend to them an unnecessary statutory protection. And before the special statute of Charles II, rendering it actionable for a judge to refuse a suit of " habeas corpus," it was the opinion of the eminent English lawyer Wilmot, when consulted by the Lords, that " the subject had no remedy at Law by action or otherwise against the Judge for such refusal." The denying a Writ, he says, stands upon the same ground as any other breach of duty.

We need dwell no further, however, upon what is a well settled principle of English Common Law as regards English Judges of Record, which, in the case of *inferior* Courts frees them from liability in respect of judicial acts which are within the scope of their jurisdiction. In the case of Houlder v. Smith L. J. N. § 28 p. 170, it was clearly laid down that the judge of a county Court in England is not answerable at Common Law to an action of trespass for an erroneous judgment or for any judicial act within the scope of his jurisdiction.

In the present case, we think it a reasonable conclusion that the Common Law privilege accorded to English Judges of Courts of Record may be held to follow them to a Consular Court of Record where English law is administered. That a Consular Judge so acted within his jurisdiction, must, of course, be pleaded, but that plea, in our view, would be sufficient to bring him within the scope of any Common Law protection to which he may be entitled, just as the plea of acting without malice or want of reasonable or probable cause might be held to entitle him to the privilege of the statute 11 & 12 V. C. 44 which repealed and replaced the statute indicated in 6 & 7 V. C. 94 and referred to in § 33 of the Order in Council.

Leave is given to both parties to amend their pleadings, if so desired, in the light of this decision. Costs reserved.

SUPREME COURT

RES JUDICATA—VAGUE EXPRESSION—AUTREFOIS ACQUIT—AUTREFOIS CONVICT—CERTIORARI—DECISION OF DISTRICT MAGISTRATE—PLEA MUST BE DISTINCT IN CRIMINAL PROCEEDINGS SHARTHAND WRITER'S NOTES—RECORD CANNOT BE ADDED TO—DECISION REVERSED.

A party convicted by a District Court having appealed, the conviction was set aside by the Supreme Court.

Another information having been filed, the party pleaded "res judicata," which plea was upheld by the District Court.

A writ of certiorari having issued, it was held by the Court:

1o. *That they must take the Record of the appeal case such as it stood when examined by the Court below, and could not allow the shorthand writer's notes to be now introduce therein, as moved for by the Crown, so as to establish that the ground of their first decision was the incompetency of the first Information.*

2o. *That "res judicata" was a doubtful and ambiguous expression, which might mean either "autrefois acquit" or "autrefois convict," and that such as vague expression must be rejected in a criminal prosecution.*

3o. *That the Magistrate's decision did not show whether he considered that the accused had been previously acquitted or previously condemned.*

Decision reversed— Case referred back to Magistrate.

THE HONORABLE THE PROCUREUR GENERAL
and
THE JUNIOR MAGISTRATE OF PORT LOUIS & EUGÈNE MONTY.

Before
His Honor Sir E. J. LECLEZIO,—Chief Judge
and
His Honor J. ROUILLARD,—Puisne Judge

The Hon. L. Cox Procureur General,—appears for plaintiff.

J. GUIBERT. Crown Attorney,—Attorney for the same.

MM. NEWTON & LAURENT,—Counsel for defendants.

Record No. 24,382.

29*th May*, 1888.

From the Record returned by the Magistrate after service of the Writ of Certiorari issued at the request of the Procureur General, it appears that Inspector of Police Talibard swore an information before the Magistrate charging Monty with— as an agent and servant of public Department to wit: A guard of Inland Revenue under Ordinance 6 of 1878 and a constable of Police, wilfully and unlawfully by a gift and reward of Rs. 12 received from one Chanhya, a consolidated retailer of Condé and d'Alembert streets — having abstained from doing an act which belonged to the discharge of his duty to wit: with having abstained to report his superior officer a breach of Ordinance 3 of 1876 which he Monty had established against Chanhya. When the case was called the counsel for Monty argued that the accused could not be prosecuted on this information because there was "res judicata" in this matter and he moved that he be discharged.

The record of the case of Duvergé v. Monty No. 1258 of 1887, Crown side of the District Court, and the Judgement of the Supreme Court of the 17th. of February last in the appeal case of Monty v. Queen were produced to the Magistrate, who proceeded to the Registry of the Supreme Court to ascertain whether there was a written Judgment of the Judges in the appeal case. He afterwards delivered judgment in the following terms. "After having read the Record pro-
"duced, the information in the present case,
"and the judgment filed, and after having
"ascertained at the Registry of the Supreme

" Court that there exists no written judg-
" ment of the Judges in the case of appeal of
" Monty. I am of opinion that there is
" res judicata" in this matter and I discharge
" the accused."

The Procureur General now says that the Magistrate's Judgment was wrong in law, because amongst other reasons, his finding that there was " res judicata" in the matter did not constitute a bar to the prosecution ; and in as much as the Magistrate did not find or hold that Monty had been either acquitted or convicted on a valid information for the offence with which he was charged, it was not competent for the Magistrate to discharge Monty. In the course of his argument, the Procureur General alluded to the judgment delivered by this Court in the appeal case of Monty v. Queen and stated that it results from the judgment, such as it was taken down by the sworn shorthand-writer when delivered, that the Court quashed the information of Duvergé in the first case because he had no power to swear such an information under the Penal Code, and the Procureur General moved that this judgment such as it was taken down by the short hand writer, being now in the Record of the appeal case, should be read by the judges. This was objected to by the counsel for Monty on the ground that when the Magistrate went to the Registry, he did not see this judgment in the Record, and it was not in evidence before him.

The practice is, in a matter of certiorari, to take the Record as it stood in the Court below, and the notes of the shorthand writer not forming part of the Record of the appeal case at the time the Magistrate went to inspect it, an inspection which he was not bound to make, we cannot now allow them to be put in as evidence before us. This being said, we have now to examine whether the Magistrate's decision that there was " res judicata" in the matter is sufficient. The plea before the Magistrate was res judicata, and the Magistrate after having examined the evidence adopted the words of the plea and held that there was "res judicata." It is true that Paley an Summary convictions, after speaking of the defence of autrefois acquit or autrefois convict, makes use of the words "objection of "res judicata" but this is to refer to the general principle that a man can plead either autrefois acquit or autrefois convict. In our local Ordinances on the District Courts there is no provision relative to that plea ; it is only in the Criminal Procedure Ordinance of 1853 (No. 29) that in articles 71 to 76, certain rules are laid down with regard to the pleas of autrefois acquit and autrefois convict : for instance article 73 says : " the acquittal is not a bar unless it " be on a sufficient information &c."; Article 74 " every plea of autrefois acquit shall " show by voucher of the Record and proper " averments, an acquittal of the defendant by " judgment of a Court of competent juridis-" diction &c." Article 75 " any previous " convictions or attainder for the same of-" fence in fact and in law with that charged " in any criminal information may be pleaded " in bar of such information ; " and article 76 " the rules applicable to the pleading of " a former acquittal shall, so far as they may " be applicable, be applied to the pleading " of a former conviction or attainder." If we turn to the English Law we see that by the 14 and 15 Victoria C. 100 § 28 " in any " plea of autrefois convict or autrefois acquit " it shall be sufficient for any defendant to " state that he has been lawfully convicted " or acquitted (as the case may be) of the said offence charged in the indictment.

It follows from the above, that in criminal prosecutions there cannot be such a plea as that of " res judicata" which, as it may mean one or other of two alternatives, must be rejected as doubtful and ambiguous. The same error appears in the judgment of the

Magistrate. By dismissing the charge on the ground that there was "res judicata" he has allowed the same uncertainty and ambiguity to continue in his judgment. On looking at the record of the proceedings before the Magistrate, the Court cannot know the real ground on which Monty was discharged by the Magistrate. He does not say whether he considered that the judgment of the Supreme Court on appeal was equivalent to an acquittal, or whether he considered that although this judgment was not equivalent to an acquittal, the accused having been already tried for and convicted of the offence for which he was prosecuted a second time—he should not be put again in jeopardy and was entitled to plead autrefois convict. Although derived from the same general principle namely "res judicata" those questions might give rise to delicate points of law of a different nature according as the finding of the Magistrate be autrefois acquit or autrefois convict. It is not possible to say what the Magistrate really meant by his judgment of "res judicata" in this matter, and as his judgment is vague and uncertain, we must set it aside and send back the Record to him in order that a proper plea should be entered and the case proceeded with in accordance with the principles laid down in this judgment.

SUPREME COURT

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ARREARS OF TAXES.—ORD. 18 OF 1843.—ORD. 21 OF 1851.—ORD. 19 OF 1868.—ART. 200.—IMMOVEABLE PROPERTY.—PUBLIC SALE.—OCCULT PRIVILEGE.—DIVISION OF SALE PRICE.—TARDY CLAIM BY MUNICIPALITY.

An immoveable property was purchased at the bar of the Master's Court; a distribution of the sale price took place, and on a deed of partition (afterwards duly homologated) being made between the heirs of the vendor, several creditors received delegations on the sale price of the said property.

Several months afterwards, the Municipal Corporation lodged an attachment in the hands of the tenants of the purchaser for arrears of taxes due by the vendor.

The Municipality rested its rights on Art. 50 of Ord. 21 of 1851 and Art. 35 of Ord. 18 of 1843.

Held by the Court:

1o. *That Art. 35 of Ord. 21 of 1851, must be construed in connection with Ordinance 19 of 1868, which was passed—inter alia—for the object of protecting purchasers of immoveable praperties at a public sale, against the danger arising from occult privileges and mortgages.*

2o. *That under Art. 200 of that last Ordinance, "the final price of adjudication shall, "to all intents and purposes, be deemed to "be the final and definitive value of the "property, and the adjudicatee shall be ex-"onerated and liberated from "all" privileged and mortgaged claims thereon "by paying the price conformably to law."*

3o. *That the sale here was conducted, like all public sales under our law, in such a manner as to give ample warning to the parties interested, and that, consequently, the Municipality was only suffering through its own laches.*

Attachment set aside with costs.

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MOOSSAJEE ISSOPJEE,—Plaintiff.

and

THE MAYOR AND MUNICIPAL CORPORATION,—Defendants.

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Before

His Honor Sir E. J. LECLÉZIO KT.,—Chief Judge.

and

His Honor JOHN ROUILLARD,—Puisne Judge.

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H. GALÉA,—Counsel for Plaintiff.
P. F. LASTELLE,—Attorney for the same.

G. GUIBERT,—Counsel for Defendants.
E. LAURENT,—Attorney for the same.

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Record No. 24434.

29*th. June* 1888.

An immoveable property situate in this town was purchased by Moosajee Issopjee on the 21st October 1886, at the bar of the Master's Court, on a licitation between the heirs and representatives of the late Thomy Manuel.

A portion of the sale price was deposited in Court at the time of the adjudication and the whole price according to the memorandum of charges, was stipulated payable according to a distribution by way of an ordre, or to a judgment of the Master, unless otherwise specially ordered by the competent Court.

The immoveable property purchased by Moossajee Issopjee was certified by the Conservator of Mortgages as free of Inscription; and on a deed of partition being made between the heirs of the late Thomy Manuel, several creditors of the estate of the late Thomy Manuel received delegations both on the sum deposited in Court by Moossajee Issopjee and on the portion of the sale price still unpaid by him. The deed of partition was homologated by a Rule of Court under date 15th December 1887.

On the 28th March of the present year, four attachments were lodged in the hands of tenants of Moossajee Issopjee for taxes due to the Municipality by the late Thomy Manuel on account of the immoveable property now belonging to Moossajee Issopjee. This latter now asks that the attachment be set aside.

The Municipality of Port Louis rests its rights on Article 50 of Ordinance 21 of 1851, which enacts that the Municipal rates or taxes "shall have the same priority and privilege as provided by Article 35 of Ordinance 18 of 1843 and in case any proprietors "of real property subject to be rated under "this Ordinance, shall not be possessed of "any distrainable goods, it shall be lawful "for the said Collector to seize and cause "such real property to be sold in the usual "form and manner as prescribed by the Co-"lonial Law in matters of forcible ejectment "from immoveable property."

Article 35 of Ordinance 18 of 1843 runs as follows: "The privilege of the Treasury for the recovery of the direct taxes "operates independently of the Inscription. 1o ..... 2o. on account of "the land tax due for the last five years, "upon the crops, fruits, rents, and revenues "and upon the proceeds of the sale of real "estates subject to taxation, without preju-"dice to the other rights which the Public "Treasury may exercise upon the estates of "debtors equally with any other creditor."

Article 35 of Ord: 18 of 1843, with the exception that it confers on the local Treasury a privilege on the sale price of immoveable property, is founded on the same principles as a law promulgated in France on the 12th November 1808, which enacts that the Public Treasury has a privilege "pour la contri-"bution foncière de l'année échue et de "l'année courante sur les récoltes, fruits, "loyers et revenus des biens immeubles "sujets à la contribution."

The interpretation given by the Courts in France to the law of 12th November 1808 is that the privilege on the fruits of the estate may be exercised after the estate has changed hands, S. V. 1852 1—534, and if Ordinance 18 of 1843 stood alone, a similar interpretation might perhaps have been given to Article 35 of that Ordinance which enacts in a general way that the privilege of the Land Tax can be exercised on the fruits, rents and revenues .....of the immoveable property subject to taxation. But, apart from the consideration that Article 35 of Ordinance 18 of 1843 gives

a privilege on the sale price of the property, whereas the French law does not give such an important privilege to the Treasury, we think that Article 35 above cited, has now to be construed in connexion with Ordinance 19 of 1868, which was passed for the avowed object, not only of simplifying the procedure relative to public sales of immoveable property, but also of protecting the purchasers against the danger arising from occult privileges and mortgages. After dealing with parties holding vendors' privileges and legal mortgages, Ordinance 19 of 1868, Article 200, enacts that: "from henceforth whenever an "immoveabl property will be sold by public "competition before the Master, the final "price of adjudication shall, to all intents "and purposes, be deemed to be the final and "definitive value of the property and the "adjudicatee shall be exonerated and liber- "ated from all privileged and mortgaged "claims thereon by paying his price conform- "ably to law."

It is true that the privilege of the Treasury is not here specially referred to, nor are the privileges mentioned in Articles 2101 and 2103 of the Civil Code, but when the general and sweeping terms made use of in Article 200 of Ordinance No. 19 of 1868 are taken in connexion with the several provisions of the same Ordinance, the object of which is clearly to give to the purchaser, in a public sale of an immoveable property a definitive title and to guard him against occult privileges or mortgages, we must come to the conclusion that Article 200 of the Ordinance above referred to, applies amongst others to the privilege conferred on the Municipality by Article 50 of Ordinance No. 21 of 1851.

Here the purchaser, by a deed of partition duly homologated, has been ordered to pay his purchase price to certain parties. That order may be enforced at any time. If the present attachments were allowed the purchaser would be exposed to the risk of paying, over and above his purchase price, th sum alleged to be due for taxes to the Muni cipality by the estate of the late Mr. Manu and this is precisely one of the dangers again which Ordinance No. 19 of 1868 Art. 200 wished to protect purchasers of an immoveabl property. It must be borne in mind that thi was a public sale of an immoveable property These sales are conducted, according to ou law, in such a manner as to give ample war ing to the parties interested. The Municip lity had therefore full opportunity, either b intervening in the proceedings before th Master, or whilst the deed of partition wa being drawn up, of obtaining payment of it claims on the estate Manuel and if it i now too late for the exercise of its privileg on the sale price of the property,—it suffer only by its own laches.

We hold in consequence that the attach ments which are the subject of the present reference from Chambers are null and void.

Costs against the defendants.

SUPREME COURT

CONFUSION—ART. 1300 C.C.—BARE OWNERSHIP—USUFRUCT—FULL OWNERSHIP—CREDITOR AND DEBTOR—ERASURE OF INSCRIPTION—ACTION DISMISSED.

Plaintiff, the debtor of a certain sum as part of the sale price of a Sugar Estates, became, by her husband's death, owner of the usufruct of the sum, while the bare ownership thereof accrued to her minor children.

She submitted that under such circumstances, the claim was extinct, she being at the same time debtor and creditor of the sum.

By the Court:

It is settled law that it is only to cases in which the person who is asking confusion has

the full ownership of the claim he wishes to be declared extinct, that the principle enacted by Art. 1300 *C.C. applies.*

This is not the case here.

Action dismissed.

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DUHAMEL, —Plaintiff.

and

DUHAMEL AND OTHERS, —Defendants.

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Before

His Honor Sir E. J. Leclezio Kt.,—
Chief Judge.

and

His Honor A. Mure,—Puisne Judge.

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G. Guibert,—Counsel for Plaintiff.
V. Ducray,—Attorney for the same.

Messrs. L. Chastellier & V. Delafaye,—
Counsel for Defendants.

W. Leblanc,—Attorney for the same.

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Record No. 24,437.

29*th. June* 1888.

The plaintiff purchased the Sugar Estate "Petite Rosalie" on the 21st April 1887 before the Master of this Court. In March last she sold to Cécile Duhamel and Fernand Duhamel a share in that Estate and a civil partnership was then formed under the style of Vve. H. Duhamel & Co. for the ownership and working of the Estate. The price of the Estate, on the purchase of the Estate by the Plaintiff at the bar, was distributed by way of an "Ordre" drawn up by the Master and closed on the fourth of October last. It results from the "Ordre" that a collocation of Rs 12,879.61c. was made, as to the usufruct, to the Plaintiff and, as to the bare ownership, to her minor children, named in the declaration the issue of her marriage with her late husband Henri Duhamel.

The Plaintiff says that in terms of her marriage settlement with her late husband she is is the donee of her husband, for the half of the property left by him in usufruct only, and that she has the right to receive the amount of the principal sums on which her usufruct rests without being bound to give security for the same, the only condition being an inventory after the decease of her husband. The inventory as required by the marriage settlement, was duly made and the Plaintiff now alleges that, by the effect of the purchase made by her at the bar of the Master's Court of the Estate "Petite Rosalie" and of the collocation made to her at the "ordre" of the sum of Rs 12,879.61c. in usufruct, the bare ownership belonging to her minor children, a confusion of the claim has taken place, the Plaintiff being at the same time debtor and creditor of the same; and she prays for a judgment declaring that claim, which rests by privilege on the Estate "Petite Rosalie" is extinct by confusion in her person, in virtue of the deed of marriage settlement, and as a consequence ordering the Conservator of Mortgages to erase from his Registers the inscriptions which maintain this privileged claim. The sub-guardian and subguardian ad hoc of the minor children abide by the decision of the Court, and so does the Ministère Public.

Article 1.300 of the Civil Code enacts that "lorsque les qualités de créancier et de débi-"teur se réunissent dans la même personne, "il se fait une confusion de droit qui éteint "les deux créances" and it has been held that confusion can only result from a succession or transmission in full ownership. "Attendu, says the Court of Cassation "(S. 1839. 1. 133), qu'il résulte de cette dis-"position que pour qu'une dette soit éteinte "par la confusion, il faut que les qualités "de créancier et de débiteur se réunissent

" dans la même personne ; que cette réunion " ne peut s'opérer qu'autant que la même " personne se trouve avoir tout à la fois " la pleine propriété do la créance dont " elle était débitrice, ou qu'elle devient " débitrice de la créance dont la pleine pro- " priété lui appartenait ;—Que la confusion " n'est qu'imparfaite, et par conséquent, in- " capable d'opérer l'extinction de la dette, " lorsque le débiteur n'acquiert, à quelque " titre que ce soit, que la nue propriété " de la créance par lui due, et que l'usufruit " de cette créance appartient à un tiers."

The converse of the case decided by the Court of Cassation must be equally true, according to the principle laid down by that Court and by the commentators, see Demolombe—Contracts Vol : 5 No. 710. Larombière under Art : 1300 No. II. Dalloz Ver : Obligations No. 2804. In number 2805 he explains this principle very well in his criticism of an arret of Grenoble which had refused to declare extinct by confusion the interest of a claim of which the party had only the usufruct : " s'il est vrai que la confusion " ne s'opère qu'autant que l'on a la pleine " propriété et non pas seulement l'usufruct " d'une créance, c'est que cette confusion ne " peut s'opérer au préjudice du nu-proprié- " taire."

We must therefore take it to be settled law that it is only to cases in which the person, who invokes confusion, has the full ownership of the claim which he wants to be declared extinct that the principle enacted by Article 1300 can be applied. In this case the Plaintiff has only the usufruct of the claim, and her minor children have been collocated at the " ordre " for the bare ownership of that claim, we cannot therefore declare the claim to be extinct by confusion ; as a consequence the action now before us must be dismissed.

SUPREME COURT

MAURITIUS RAILWAY—FIRE CAUSED BY ENGINE —FAUTE— NÉGLIGENCE— CIRCUMSTANTIAL EVIDENCE —LIABILITY OF GOVERNMENT— ENGLISH LAW—ORDINANCE 8 OF 1864—CODE CIVIL— ARTICLE 1383 ET SEQ :— APPEAL DISMISSED.

The Court having found on a previous appeal that fire had been set to the canes of plaintiff in the Court below by an engine of the defendants and having referred the case to the District Court to enquire into the question of " faute or negligence ", the District Court had found that the defendants had been guilty of "faute" and "negligence" and had condemned them to pay damages.

On appeal from the said finding, one of the Judges considered.

1o. *That no "faute or négligence" had been established against appellants.*

2o. *That from Ordinance 8 of 1864 and the Bye-Laws framed under that Ordinance, it was clear that the local legislature intended that engines were to be run on the Mauritius Railways.*

3o. *That, in England, it is now settled law that no action will lie for doing what the Legislature has authorised, if it be done without negligence.*

4o. *That in France, if the act complained of is " licite ", i.e. not contrary to law, no action lies for damages caused to another party by that act.*

But the majority of the Judges held :

1o. *That in a case like the present, it is very difficult, if not impossible, for a plaintiff to obtain direct evidence of the "faute" or "négligence" of the defendant, as he is dealing with a matter which is beyond his inspection or power of inspection.*

2o. *That in the present case the "faute" or*

"negligence" complained of, had sufficiently been established, (like the setting of the fire to the canes by the defendants' engine) by circumstantial evidence.

3o. *That the authority, express or implied, to the Government to use steam engines on their Railway Lines, did not give them power to burn their neighbour's property without paying for it.*

4o. *That whatever may be the jurisprudence in England, the law which was applicable to Mauritius was to be found in Article* 1383 *and seq : of the Code Civil.*

5o. *That the local Ordinances on Railways did not contain any provision from which it might be inferred that persons injured by the working of our Railways have no right to invoke principles enacted in the said Article* 1383 *and seq : of the Code Civil.*

Appeal dismissed with costs.

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THE
COLONIAL GOVERNMENT,—Appellants.
and
HAREL & OTHERS, —Respondents.

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Before
His Honor Sir E. J. Leclézio Kt.,—
Chief Judge.
The Hon. A. Mure,—Puisne Judge.
and
His Honor J. Rouillard,—Puisne Judge.

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The Hon. L. Cox, Procureur General, —
Appears for Appellants.
J. Guibert, "Crown Attorney",—Attorney
for the same.
L. Chastellier,—Counsel for Respondents
G. Ritter,—Attorney for the same.

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Record No. 899.

10*th. August* 1888.

Judgment

Delivered by His Honor The Chief Judge.

By a previous judgment of this Court, it was decided that it was an engine of the Railway Department that caused the fire which destroyed Respondents' canes, and the Magistrate of Plaines Wilhems afterwards held that the appellants were liable in damages because there had been negligence or fault on their part on the day that their engine set the respondents' canes on fire. The Magistrate's reasoning is as follows: 'The Mauritius Railways ran machines "with good spark arrestors, but ones liable "to get out of order. If kept in order, these "spark arrestors would have stopped sparks "sufficiently large to cause mischief. We "have the Judgment of the Supreme Court "deciding that an engine of the Railway "Department did cause the fire which "damaged the Plaintiffs' canes. The "only rational conclusion we can come to "then, is that the spark arrestor on that "particular machine which passed the spot "where the fire arose was not in good order. "This constitutes neglect or faute on the "part of the defendants."

This judgment has been criticized by the appellants who said that the Magistrate having no direct evidence that the spark arrestor was not in good order ought not to have assumed that it must have been out of order. I cannot, however, find fault with the Magistrate's reasoning, it is based both upon the evidence of the appellants' witnesses, who declared that spark arrestors were good and that no spark big enough and susceptible to set fire could be emitted by them, and upon the evidence of Mr. Piddington, a well known engineer of this place, called by the Respondents, who stated that, in theory, the former system of spark arrestors (that is the one in use at the time

of the fire) was as good as Watson's (that is the system adopted since the fire) but in practice was liable to get out of order too easily.

Now the Magistrate was in presence of a statement of fires for which compensations were paid by the Railway Department, from which it results that in 1883 there were fifteen fires caused by sparks from the engines, in 1884, twelve and in 1885, eighteen fires—this statement was certainly in corroboration of Mr. Piddington's opinion that in practice the spark arrestor in use at the time of Trianon's fire was liable to get out of order too easily and the Magistrate was perfectly entitled to come to the conclusion that if, as stated by the appellants' witnesses, the spark arrestor in use was a good one and that no spark big enough to set fire could be emitted by it, it must have been out of order at the time that the engine, to which it was adapted, set the Respondents' canes in fire. This inference is far from being a remote one and it is one of these "presomptions" which our Civil Law allows a judge to adopt in cases where parole evidence is admissible. There are many cases in which it is very difficult, if not impossible, to obtain direct evidence of a "faute" or negligence of a party sued, and in our interlocutory judgment of the 2nd. February 1887, in this very case, we said "we are aware of the difficulties which "surround a Plaintiff bringing such a case "as the present, he is dealing, with a matter "which is beyond his own inspection or "power of inspection" and, certainly, unless the Respondents had the means of immediately inspecting the spark arrestor of the engine which set their canes on fire, it was not possible for them to show by direct evidence that it was out of order at the time of the fire and such a fact could only be gathered from what may be called the scientific or technical evidence in the case. When we decided that it was the appellants locomotive that set the respondents' canes on fire, we proceeded in the same manner for we had no direct evidence showing that a spark coming from the locomotive had fallen into the Respondents' fields.

The statement of fires caused by Railway engines in 1883, 1884 and 1885 which has been filed by Mr. Caulfield the Manager of our Railways, is also important to show that the Trianon fire was not one of those rare accidents which sometimes happen in spite of all precautions, and this leads us to examine another aspect of the question now submitted to our consideration. It was said that the Court could not declare the Railway Department responsible for the fires caused by sparks emitted by their engines, because the use of locomotives having been authorized by the legislature either expressly or impliedly, if an accident happened now and then, altho' the best systems known are employed, the sufferer has no right to compensation. The English decisions which are in favor of this theory appear to be based on an express authority by the legislature to make use of locomotive engines. Our local Ordinances in the subject merely imply the use of locomotives. I confess that I do not find much difference between an express and implied authority by the Legislature, but I am not prepared to admit that such an authority would, in the words of Baron Bramwell, in the case of Vaughan vs. Taff Vale Railway Cy. give the power to our Railway Department "to "burn their neighbour's property without "paying for it." Whatever may be the value of the jurisprudence which appears to prevail in England on this matter, we have our own law to apply which is to be found in Article 1382 and following of the Civil Code, and I think that the French decisions should be our guide in applying these articles to the present case. For the ap-

ellants, a decision of the Court of Cassation ras quoted from S. V. 1871.1.9, but I think hat it is not in point. In that case a person ras injured by the explosion of a boiler. It ras held that in order that the owner of he boiler, should be held liable, some fault, ther than the mere fact of the working of he boiler should be proved. We read the ollowing phrase in the decision of the Court of Cassation "attendu que dans le "cas où, comme dans l'espèce, il s'agit de "l'explosion d'une machine, chaudière à "vapeur, et bien que cette explosion se "rattache au fait actuel du propriétaire ou "de ses agents, celui qui poursuit la répara- "tion du dommage par lui souffert doit "établir, outre l'accident, la faute qu'il "impute comme engageant leur responsabi- "lilé; qu'un pareil évènement qui peut "être le resultat d'un cas fortuit et de force "majeure, n'implique pas nécessairement "par lui-même la faute ou l'incurie du "défendeur."

In the present case the facts show that the fires along the Railway lines were of frequent occurrence, and the sparks which set the Respondent's canes on fire could not therefore be attributed to a mere "cas fortuit" as the accidental explosion of a boiler in a manufactory. A judgment of the Court of Bordeaux S. V. 1860.2.42, is certainly more in point. The Court expressed itself as follows :

"Attendu, en droit, que quelque utiles "que soient les chemins de fer, les com- "pagnies qui les exploitent sont comme "toutes les compagnies industrielles soumises "à la loi commune et tenues d'après l'article "1382 C. Civil, de réparer le dommage "qu'elles occasionnent, qu'elles n'ignorent "pas le danger qu'elles font courir aux "propriétés contiguës, que c'est à elles, sous "peine d'être en faute, de prendre les "précautions nécessaires pour le prévenir; "que si les mesures tracées par l'adminis- "tration n'y suffisent pas, elles devraient "en prendre de plus amples et de plus "efficaces; qu'enfin, la science fut-elle quant "à présent impuissante, les compagnies n'en "seraient pas moins obligées d'indemniser "les propriétaires incendiés, car le dommage "nécessaire occasionné par une industrie "doit être à la charge de cette industrie et "l'Etat n'a ni concédé ni pu concéder aux "Compagnies de chemins de fer le droit "d'incendier sans indemnité les propriétés "riveraines."

It was said that the judgments of the French Courts in those matters were influenced by the French Law of the 15th July 1845 on Railways, which we have not here, but it will be observed that the Court of Bordeaux refers only to Articles 1382 of the Civil Code. Besides our local Ordinances on Railways do not contain any provision from which it might be inferred that persons injured by the working of our Railway lines have no right to invoke the principles enacted in Article 1382 and following, nor do I think that it was contemplated by our Legislature to confer on the Railway Department the power to run locomotives with the risk of burning the neighbouring properties without compensation.

I am therefore of opinion that, upon the whole, the Magistrate has come to a sound conclusion and that his judgment should be maintained.

JUDGMENT

Delivered by MR. JUSTICE MURE.

By a judgment of 2nd. February 1887, this Court determined that the fact that the Respondents' canes had been burnt by sparks from the appellants' locomotive was insufficient, irrespective of any fault or negligence, to make the latter liable to pay any indemnity to the former, and that the existence of "faute" is an essential requisite of any plaint

like that we had then to deal with. As the plaint in this case contained no averment of that kind, the Court allowed it to be amended.

In pursuance of this judgment, the Respondents (Plaintiffs in the Court below) amended their plaint and added allegations that the defendants (now the appellents) were at fault for having omitted to take precautions in working their engines so as to avoid causing damage to plaintiffs' property, especially in the dry month of November, and, further, that the defendants were guilty of imprudence and negligence in using their Railway Engines in such a way as to allow them to emit sparks. It was further alleged that the defendants were at fault for having continued to use sparks arrestors which they had been using for years and which were known to be defective and insufficient.

It is to be observed that these amendments were made after the whole proof of parties had been led in the lower Court, and after both parties were thoroughly aware of all that could be proved on both sides.

This Court subsequently held, reversing the judgment of the District Magistrate, that sparks from the engine of the appellants had set fire to the Respondents' canes, and we have now to determine whether there has been "faute," either of negligence or imprudence, on the part of the Railway Department, or whether the fire was the result of a fact over which the latter had no control and which is to be regarded as an accident.

Negligence or imprudence may be summed up under two heads, either that the Railway Department omitted to do something which a reasonable and sensible man would have done, or actually did something which such a man would not have done. Was there anything on the conduct of the Railway officials which comes under either of these heads? The plaintiffs have simply proved that after the goods train which leaves Port-Louis at 10 50 a. m. had reached Phœnix Station, a fire broke out in squares of canes adjoining the line. They have not in their proof in chief attempted to prove "faute" of any kind, they have certainly not proved in that part of their proof anything approaching to the allegations made by them in their amended plaint. By these amendments it was alleged that there had been an omission to take precautions so as to avoid causing damages and while the plaintiffs have not proved anything on that head, they have endeavoured to make out from the defendants, proof that there was such an omission. Of course, there are differences between the witnesses on this subject, but I am of opinion that the evidence of the defendants shows that every precaution was taken which science, as known at the time, enabled the defendants to avail themselves of, so as to try and avoid causing a fire. It is proved by the Railway officials that spark arrestors, though not used in England, are used constantly in Mauritius. Mr. Caulfeild, the Engineer and Manager of the line, swears that the spark arrestors used on the Railway are the best which could be procured, and that no better kind of arrestor could have been obtained in November 1885. Cockayne, who drove one of the engines of the train, says he had much experience as an engine driver on the Midland Railway in England, that no spark arrestors were used there and that the wire caps on the top of the funnels, used on part of that line, are not so effective to prevent sparks as the spark arrestor used in Mauritius. "In my opinion, he says, "the spark arrestor which was on my "engine in November last, was the best I "had seen yet." Walker, the locomotive

foreman, considers "the spark arrestors "used in Mauritius, to be very good indeed." If then the Railway Department used the best known system of arresting sparks, it is difficult to see how the allegation that there was an omission to take precautions in working their engines can be held to be proved. It is true that, in reply to the defendants' evidence, an engineer called Piddington was examined by the plaintiffs, and he states that in theory the former system was as good as Watson's (which has, since the date of the fire, superseded the former) but in practice that system was liable to get out of order too easily. The District Magistrate says that the only rational conclusion that can be come to is "That the spark arrestor "on that particular machine which passed "the spot when the fire arose was not in "good order." Now, it is proved by Mr. Caulfeild and others that the spark arrestors consist of perforated plates placed just above the top row of the tubes of the boiler in the smoke box of the engine. These plates are rivetted in their place and it is difficult to conceive how such a spark arrestor, if in good order when it started from Port Louis, could in the space of a run of ten miles get out of order. The undoubted inference, from the evidence of Cockayne the driver and the firemen, is that the spark arrestor in the engine was at the time in good order. In short, this hypothesis of the Magistrate is not proved as a matter of fact; it is not even hinted at as being possibly the fact in the whole course of the proof. It seems to me that it is difficult to proceed in such circumstances upon a presumption which is not only not directly proved, but which is not even suggested by any of the proved facts of the case. I cannot therefore accept this hypothesis or presumption as proved, or regard it as a satisfactory ground of liability for fault against the defendants.

It is, moreover, alleged by the Plaintiffs in their amended plaint, that the defendants were guilty of imprudence and negligence in using their Railway Engines in such a way as to allow them to emit sparks. This allegation of imprudence or negligence is not attempted to be proved by any overt act. On the contrary, so far as appears, every thing was done which any reasonable man could do, and nothing was omitted which such a man should do. As we have seen the best known spark arrestors were placed in the smoke box of the engine. It is true that science had not then reached such a point that small live sparks did not get through, and when the weather was very dry these set fire in certain cases to neighbouring crops. But this fact, however much to be regretted, does not prove imprudence or negligence in the last degree. If the Railway is to be run at all, and the high gradients so frequent in Mauritius are to be overcome by the engines, and if the best possible precaution is taken to prevent injury, it is difficult to see how imprudence and negligence can be attributed to its officials with any propriety. The arguments of the plaintiffs must be carried to the length of stopping the running of trains on the Railway altogether, unless science had advanced to such a stage, that it could keep up the draft of the engine, and yet keep back all the live bits of coal which pass through the tubes of the boiler into the smoke box. There is a further allegation that there was a continuance of using spark arrestors which were already known to be defective and insufficient. What the proof shows is that among the engineering staff of the Railway there was much consideration about getting an efficient spark arrestor. As Mr. Caulfeild indicates, they talked about it amongst themselves, and endeavoured to improve it, and just at the time the fire in question occurred, Watson, one

of the Railway Engineers, had invented a cylindrical spark arrestor which undoubtedly is a great improvement over the horizontal one previously in use. Surely, it cannot be seriously argued that it is legal "faute" not to have made the invention at an earlier date. Nor can legal "faute" be deduced from the fact that fires had previously occurred along the Railway line. We do not know the facts and circumstances attending these fires, which were never investigated, and the Railway paid, because the liability in regard to them was not contested and we cannot say whether there might or might not have been a good defence in every one of these cases. In short, this case must be determined upon its own merits and without any referenee to any other occurrence. The only other blame which is attributed to the defendants is that it is alleged that a number of men should have been stationed at short distances along the line in order to watch for and put out fires. It is clear that this is a remedy which would never prevent the fire catching, but only prevent the extending of the damage. This remedy has been adopted, and it is proved that it was the duty of a watchman to walk after the train between Quatre Bornes and Phœnix Stations to do the very thing which the plaintiffs require. But they say that these guardians were not numerous enough. Here again, I cannot hold that there is "faute" proved; it is clear that this is a remedy which must be of limited application, and it seems absurd to expect that several men are to be placed at short intervals over an extensive line of Railway ready to put out any fire which may occur; the result would be that the expense of working the Railway would be enormously increased and might reach such a point as would make it difficult to continue working. Such being the view I take of the facts of this case, it is only necessary very shortly to refer to the legal argument which was submitted to the Court. As to the liability, it is to be remembered that it is not enough simply to prove that sparks from the Engine caused this fire, so that the defendants should be held liable for the consequences. That is a system which is comprehensible, and which appears to have been the law of former times. The owner or proprietor was answerable for the damage caused by his property not because he was "en faute" but simply because he was the proprietor or owner. The idea was that you have the sole property and control over the article, you have all the profit and benefit accruing from its use and you are bound if it injures any one to make reparation therefor. Take the present instance, the defendants use a machine of great power and force and proceeding at a high rate of speed, and under this system of law the defendants do so at their own risk and peril. The plaint in this case, as it was originally presented in the District Court, contained averments made apparently on the supposition that this system of Law still prevails. In like manner, in one of the French Railway cases to be hereafter referred to, the Court, in consequence, as I think, of a special law which had been previously passed for France, lays it down (S. V. 1860 part 2 page 43) that "le dommage nécessaire "occasionné par une industrie doit être "à la charge de cette industrie." But the founders of the Code Civil, finally established the principle that "faute" must be proved in order to create liability (Sect. 1382 et Seq.) All the commentators concur in laying down this doctrine. To cite only one: Larombière in Article 1382 Par. 10 says: "Toute question de faute et d'imputabilité "rentre elle-même dans l'examen du ca- "ractère illicite que doit présenter le fait "dommageable, or, par illicite, il faut "entendre ce que la loi n'autorise point, ce

" qu'elle défend même, ce qu'on n'a pas " le droit de faire, " quod non jure fit "— " Réciproquement, est licite ce qu'on a le " droit de faire; dès lors nul n'est en faute " quand il ne fait qu'user de son droit." The Court of Cassation in an important judgment found in S. V. 1871 p. 1, p. 9 have clearly laid it down that in every case in which a defendant is held responsible for a result, "faute legalement imputable" is an essential condition of the action and that it is for him who asserts that he has been injured to prove the fault which he imputes to the defendants. It is true that this is an extreme case, but cases of that nature bring out well the principles of law. It is only one of many cases to the same effect. This is the law of this Colony. It is necessary to notice this, for in France by a special law passed on 15th. July 1845, Railways are held liable for any damage caused by the managers, directors, or employés thereof " à un titre quelconque au service " de l'exploitation du Chemin de fer (Sect. " 22) See Roger and Lorel Lois Usuelles." This law has, perhaps unconciously, yet undoubtedly, affected all the decisions of the Courts in France on this subject, even though the law itself be not referred to in the decisions. As the law of 1845 does not apply to this Colony, I do not think it necessary to comment on these decisions. But it is right to add that they are decisions of Provincial Courts in France and that the Supreme Court of that country has not been called on to decide the principle involved in this question. I cannot leave out of account the position in which Railways are placed in Mauritius. They are worked under special laws, one of which, Ordinance 8 of 1864, is literally copied in most of its clauses from the Railway Traffic Act of England 8 & 9 Vict. Cap. 20. It is true that the clause expressly authorizing the use of steam engines is not found in the Ordinance, but it was passed for the purpose of regulating the traffic on the Government Railways and by the third section, it is made lawful for the Railway Department to make Bye-Laws for various purposes and inter alia " for regulating the mode by which, and the speed at " which carriages on the road are to be " moved or propelled." The Bye-Laws framed in virtue of this power contain many pages of directions on the use of steam Engines on the lines of Railways and of the manner in which they are to be worked. The Ordinance itself, Sections 21 and 22, inflicts penalties on parties who obstruct or who otherwise interfere with engines. It is clear that the local legislature intended engines to be run on the Railways, and that the power to run Engines must be implied and it is almost trifling with the case to maintain that because Section 108 of the English Act is not specially copied into our Ordinance, that, therefore, authority is not given to use Railway engines. It seems on the contrary a safe and proper mode of interpretation to refer to the Code as establishing that there is no liability if there be no " faute ". In other words the principle of the Code is invoked; but English Law is referred to for illustrating the principle upon which certain legal results are arrived at. Thus on the authority of the cases of Rex. v. Tease (1832.4. Barnwell and Adolphus p. 80) and Vaughan v. Taff Railway (L. R. V. 29 N. S. Common Law Ex. Chamber P. 247) it is now the Law of England that if the legislature has authorized the use of steam engines for locomotion, this consequence is the result that the use of these means for the purpose intended, provided every precaution which the nature of the case suggests has been taken, is not an act for which an action will lie independent of negligence. No doubt, this principle has

been much questioned, and Baron Bramwell and others have to the last refused to acknowledge it, but in the case of the Hammersmith Railway Company (L. R. 4 English and Irish appeals p. 201) the highest Court of the United Kingdom has determined that these cases were rightly decided, and established a sound principle. One of the latest statement of the principle is given by Lord Blackburn, lately a Lord of Appeal, in the case of Geddis v. The proprietors of the Bann Reservoirs. (L. R. 3 App. cases P. 455.) He says : "I take it without "citing cases, that it is now thoroughly "well established that no action will lie "for doing that which the legislature has "authorized, if it be done without negli- "gence although it does occasion damage to "any one, but an action does lie for doing "that which the legislature has authorized "if it be done negligently." I hold that the principles thus laid down are firmly established and regulate the responsibility of parties who have received authority from the legislature to employ certain means to accomplish a particular purpose. Applying that principle to the present case and being of opinion that no negligence has been proved against the Railway Department and there being no "faute" established against it, I hold that the appeal should be sustained and the action of the plaintiffs dismissed with costs.

JUDGMENT

Delivered by MR. JUSTICE ROUILLARD.

This case is governed by Articles 1382 and following of the Civil Code. It was therefore incumbent on the plaintiffs in the Court below to prove not only that they had suffered damage, but that it was through the fault, "faute", of their opponents that the damage had occurred.

There cannot be any doubt as to the nature of the damage suffered, or its extent, I think also that the circumstances of the case sufficiently establish the "faute" for which defendants must be held liable.

Whether on account of the steep gradients which necessitate a great development of steam power or from other causes, the fires along the line, originating in sparks from the locomotives, have been very numerous. From a list supplied by the Chief Manager of Railways it appears that no less than forty five fires took place along the Railway line in the years 1883, 1884, 1885. It is true that several of the Railway officials have declared before the Magistrate, that the spark arrestors in use on the Colonial locomotives do not allow any sparks to escape, but if their evidence was correct, how could so many fires have taken place in so short a time.

I hold that the fault here, lies in the use by the Railway Department of engines which under certain circumstances, especially during periods of drought, are a serious cause of danger to the property of others. If it is so, the Railway Department cannot avoid liability by showing that it has done all that could possibly be done to prevent its engines from emitting sparks and destroying property. The case cited in Sirey V.1871 Part I p. 9. is not in point. In that case a person was injured by the explosion of a boiler. As boilers, if properly constructed and worked, are not an appreciable cause of danger to others, it was held, and very justly so, that in order that the owner of the boiler should be held liable, some fault other than the mere fact of working the boiler should be proved. But here, the use by the Railway Department of its engines has given rise to so many accidents that a real risk to public property by the fact of running locomotives on the Railway line must be considered as fully proved. The law in France will be found clearly stated in a judgment of the Court of Bordeaux (S. V.

1860.2.42) on a claim against a Railway Company for damages caused by sparks from an engine.

The Court expresses itself as follows : " Attendu, en droit, que quelque utiles que " soient les chemins de fer, les compagnies " qui les exploitent sont comme toutes les " compagnies industrielles soumises à la loi " commune, et tenues d'après l'Article 1382 " Cod. Nap. de réparer le dommage qu'elles " occasionnent, qu'elles n'ignorent pas le " danger qu'elles font courir aux propriétés " contiguës, que c'est à elles, sous peine " d'être en faute, de prendre les précautions " nécessaires pour le prévenir, que si les " mesures tracées par l'administration n'y " suffisent pas, elles devraient en prendre " de plus amples et de plus efficaces, qu'enfin " la science fut elle, quant à présent, impuis- " sante, les compagnies n'en seraient pas " moins obligées d'indemniser les proprié- " taires incendiés, car le dommage nécessaire " occasionné par une industrie doit être à " la charge de cette industrie, et l'état n'a " ni concédé ni pu concéder aux com- " pagnies de chemins de fer le droit d'in- " cendier, sans indemnité, les propriétés " riveraines."

The learned counsel for the appellant, has argued that whatever may be weight of the decisions of the Courts in France with reference to the interpretation to be given to Article 1382 of the Civil Code, the Supreme Court ought to be guided by the judgment of the Court of Exchequer Chamber in the case of Vaughan v. Taff Vale Railway Company, in which it was ruled, that the Railway clauses Act 8 Vict. C. 20 S. 86 having made it lawful for a Railway Company to run engines on a Railway line, the defendants were not responsible for an accidental fire caused by a spark from an engine, no negligence having been proved against them.

With reference to that judgment, it must be observed that there is among the English Judges, on the question of liability of Railway Companies under the circumstances above stated, a remarkable diversity of opinion ; but assuming that the judgment given by the Exchequer Chamber in the case of Vaughan which is based upon the section of the Railway Act which expressly authorises the use of locomotives, lays down the law as it should be applied in England at the present time, that judgment is not binding on this Court, which has to interpret the Civil Code, the provisions of which, on this particular question, are still in force amongst us.

It was remarked by the learned counsel for the Respondents that Ordinance 8 of 1864 which was passed to regulate and protect the traffic on the Government Railways " and which is chiefly based on the Rail- " way clauses act of 1845 " above referred to, does not contain any special clause authorising in express terms the Colonial Railway Department to run engines on the line. But as some passages of the same Ordinance clearly show that the use of locomotives on the Railway line was contemplated, I do not think that it makes much difference if the power to use locomotives was express or implied.

If we turn to Ordinances 8 of 1864 and 11 of 1862, a perusal of these Ordinances shows, that, when it was resolved that the Government should establish a Railway— and it has been dicided in the case of Lecoultre v. Colonial Government, that so far as the working of the Colonial Railway was concerned, the Government of Mauritius must be assimilated to a Railway Company, the legislature of the Colony gave its assistance to the Colonial Government, by enacting provisions for enabling the Railway Department to acquire land and for regulating and protecting the traffic on the Government Railways, but, it went no further, and I cannot hold that any departure from the

laws of the Colony in favour of the Railway Department was intended by the Colonial Legislature; and using the words of Baron Bromwell in the case of Vaughan v. Taff Vale Railway Company, I do not think it was ever intended "that the appellant would "have the power to run engines over their "line and burn their neighbour's property "without paying for it."

SUPREME COURT

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COLIN,—Plaintiff.

and

THE GENERAL BOARD OF HEALTH—Defendants.

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Before

His Honor A. MURE,—1st. Puisne Judge
His Honor F.C. WILLIAMS,—2nd. Puisne Judge
and
His Honor J. ROUILLARD,—3rd. Puisne Judge.

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L. CHASTELLIER,—Counsel for Plaintiff,
G. RITTER,—Attorney for the same.

Hon. J. ROUILLARD,—Counsel for defendants,
JULIUS GUIBERT,—Attorney for the same.

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*Short summary of the case and decision.**

Small-pox having broken out in a camp on the Estate of Plaintiff, the camp and the persons living in it, and 72 acres of land adjoining the said camp, were placed in quarantine by the defendants who, moreover, stopped a canal the waters of which were used for irrigation purposes.

Held, by the majority of Judges:

1o. That the temporary appropriation of the 72 acres of land was not one of those measures which the Sanitary authorities could have taken without interfering with private rights.

2o. That if the terms of a Statute are not imperative but permissive, the fair inference is that the legislature intended that the discretion, as to the use of the general powers thereby conferred, should be exercised in strict conformity with private rights.

3o. That Ordinance 8 of 1874 does not expressly authorise defendants to do acts which would restrict the use of his property by a private person.

4o. That whatever may be the interpretation given to the clause of Ordinance 8 of 1874, which empowers The General Board of Health to take measures for preventing the spread of contagious diseases, it cannot be supposed that in defiance of the recognized principles of our Law, the legislature should have authorized the appropriation of land on a large scale not on the plea of actual infection, but for the purpose of facilitating the action of the officers of the General Board.

One of the Judges, (Mr. Justice Williams) considered.

1o. That there had been in this case a gross violation of private rights perpetrated by the defendants, to the very great prejudice of the plaintiff.

2o. That the best thing to be done to avoid the spreading of a contagious and dangerous disease as Small-pox, would be, perhaps, to amend the Ordinance so as to give express and ample powers to the Board to take such action as it took in the present case, subject to a right of compensation to the proprietor of a quarantined Estate.

Plaintiff was allowed Rs. 4,000, as damages, with costs.

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* Vide Record 24,024 and decision on preliminary points in the case p. 40.

SUPREME COURT

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JURISDICTION — BENCH — DISTRICT COURT — OFFENCE NOT WITHIN JURISDICTION—CASE DISMISSED—CERTIORARI—OFFENCE DISCLOSED HIGHER THAN OFFENCE CHARGED—SECT. 5 OF ORDINANCE 11 OF 1869.

The Information charged accused with embezzlement as a servant, an offence cognizable by a Bench of Magistrates, and the evidence established that the embezzlement, if any, had been committed by accused in his capacity of public accountant etc., an offence not within the jurisdiction of the Bench.

The Bench refused to further entertain the case and on a Writ of Certiorari on behalf of the Crown, the Court decided :

That a Magistrate or Bench of Magistrates cannot be called upon to proceed with a Criminal trial when the evidence heard before them discloses a higher offence than the one charged in the Information, and when the higer offence is one as to which the Magistrate or Bench possesses no jurisdiction.

But that this judgment in no sense interferes with the exercise of the Procureur General's discretionary powers under Section 5 of Ordinance 11 of 1869, in extending in certain specified cases the jurisdiction of Magistrates, or to his right to decide upon the nature of a charge laid before any Court, so long as that Court possesses jurisdiction to deal with it.

—

THE HONORABLE
THE PROCUREUR GENERAL,—Plaintiff.

and

THE BENCH OF MAGISTRATES
AND ARMAND,—Defendant.

—

Before

His Honor Sir E. J. LECLÉZIO, KT.,—
Chief Judge.

His Honor F. C. WILLIAMS,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

The Hon. LOUIS ROUILLARD, Substitute Procureur General,—Appears for Plaintiff.

—

Record No. 24,526.

17*th. August* 1888.

The question arising in this case is simply whether a Magistrate or a bench of Magistrates can be called upon to proceed with a criminal trial when evidence heard before them discloses a higher offence than the one charged in the information, and when the higher offence is one as to which the Magistrate or Bench possesses no jurisdiction.

The defendant, the subject of the present proceedings, was charged before a District Magistrate with embezzlement committed by him as aservant, an offence in which the Magistrate has no jurisdiction unless it is specially given to him by the Procureur General under S. 5 of Ordinance No. 11 of 1869. This power was duly given, but the Magistrate exercising his discretion under Article 2 of Ordinance No. 3 of 1883, procured a reference of the charge to the Bench of three Magistrates established by that Ordinance. This Bench proceeded to Armand's trial under the information as laid under Article 333 part 2 of the Penal Code, but the evidence when placed before them disclosed in their judgment an offence under Article 122 of the Code, an offence as to which no special permission of the Procureur General can give a Magistrate or a Bench of Magistrates jurisdiction. Upon the evidence disclosing the fact that the offence was in the nature, not of such an embezzlement as they possessed jurisdiction to try, but one of such a nature that they possessed no

juristiction to try it, the Bench of Magistrates declined to proceed with the trial. The Writ was applied for upon the ground that they possessed jurisdiction, even although the evidence disclosed a graver offence than the information set forth, in as much as their appreciation of the offence should have been absolutely based upon and limited to the charge contained in the wording of the information.

A case relied on by the learned Procureur General in suppport of this view was that of in re Thompson—L.R. New Series Vol: 30 p. 19. But we cannot think that this case supports his contention very strongly, seeing that the Court was divided in opinion upon the particular issue which is before us to-day; half the judges holding that, where the evidence in a criminal case before Justices of the Peace amounts to an offence not within their jurisdiction to determine they should either dismiss it or commit the person charged for trial by a jury, while the other half of the Court, although believing that a person charged upon a major offence triable by the Justices might be convicted of a minor offence included within the scope of the major charge, did not appear, nevertheless, to extend this opinion to a case where the offience disclosed, other than the offence charged, amounts to a felony. Here, so to speak, we are in presence of a major felony, not within the jurisdiction, disclosed, where a minor felony, within the jurisdiction, is charged, and we have found no authority directly justifying a Court of inferior jurisdiction in proceeding with a trial under such circumstances. On the contrary, the doctrine of the learned Procureur General as to the limit which the wording of the information places upon a Magistrate's appreciation of the offence in such a case, commends itself less to our judgment than does the reasoning of Dalloz upon the subject — Dalloz " Compétence criminelle " 505 p. 403 says: " Le juge " correctionnel est-il lié par la qualification " donnée aux faits par la juridiction qui a " renvoyé l'affaire devant lui, ou par la cita- " tion ? La négative est aujourd'hui bien " constante dans la doctrine des auteurs et " dans la jurisprudence. On considère, " en effet, que les renvois ou citations en " Police correctionnelle ne sont *qu'indicatifs* " et non *attributifs* de juridiction, et que, " par suite, le tribunal a toujours le droit " d'examiner, d'après la nature des faits, " s'il est ou non compétent."

Further on, in the same Volume and at the same page, under No. 506, Dalloz adds: " Conformément à cette doctrine, il a été " jugé que le tribunal correctionnel peut se " déclarer incompétent même après le renvoi " a lui fait par la Chambre d'accusation, " s'il lui paraît résulter de l'instruction que " le fait incriminé constitue un crime."

In conformity with this opinion, we have decided to discharge the Writ solely upon the point of the Magistrate's jurisdiction, which we think that they rightly considered was ousted in the light of the evidence before them. But with reference to another point in the learned Procureur General's argument, it is clearly to be understood that our judgment in no sense interferes with the exercise of the Procureur General's discretionary powers under S. 5 of Ordinance No. 11 of 1869 in extending, in certain specified cases, the jurisdiction of Magistrates, or to his right to decide upon the nature of a charge laid before any Court, so long as that Court possesses jurisdiction to deal with it.

In addition to the reasons above given for discharging the Writ, we are influenced by the consideration that, if Magistrates are to assume the jurisdiction contended for by the Crown in this case, the result may be, in practice, largely to deprive offenders in this Colony of the privilege of trial by Jury

conferred upon them by our Ordinance No. 10 of 1850. So long as this institution of trial by jury, so highly prized in the mother country, is maintained here, we think that we should regard with jealousy any threatened infringements upon the privileges which it confers upon the inhabitants of this Colony, and that the Court should look with disfavour upon a minimising of offences when it has, as its result, to deprive offenders who desire to go before a jury of their peers, of what is beyond doubt their constitutional right to do so.

The Writ is discharged.

SUPREME COURT

The accused was charged with forgery and with aiding and abetting a forgery committed by the counterfeiting of certain signatures in Urdu and Chinese characters attached to several accepted accounts.

(a) *The evidence showed, except with regard to two accounts, that the signatures in Urdu represented names of persons who did not exist, and that the chinese signatures were formed merely by shams and appearances of Chinese characters.*

(b) *The Presiding Judge directed the jury to acquit as to the charges relating to the alleged chinese signatures.*

(c) *He told them that if they considered that a person heard as a witness in connection with the above two counts in* (a) *was the person whose signature had really been forged, they should convict upon these two counts.*

(d) *With regard to the signatures in Urdu of fictitious individuals, he told them that they might likewise return a verdict of guilty, but that he would reserve that last point for the consideration of the whole Court.*

(e) *He directed an acquittal with regard to the signatures in alleged chinese characters.*

The jury found accused guilty on "all" the counts of the Information.

The case having been argued before the full Bench, it was urged on behalf of accused :

1o. *That the verdict was bad as to the signatures in Urdu in (a) ; that the forgery should have been described as having taken place by the use of fictitious names.*

2o. *That is was equally bad with regard to forgery of the name of the individual heard as a witness, in as much as the jury, acting under a wrong direction, had perhaps convicted, though not believing that the signature was that of the witness.*

3o. *That the verdict was radically bad with regard to the alleged chinese signatures.*

By the Court :

1o. *The verdict with regard to the alleged chinese signatures is bad.*

2o. *With regard to the signatures in Urdu of fictitious individuals, the verdict is equally bad, as the introduction of the words "ou l'emploi d'un nom supposé" in Art.* 108 *of our Penal Code, clearly shows that a distinction is to be made between forgeries by the counterfeiting of genuine signatures, and forgeries by the use of a fictitious name —and there was here no counterfeiting of any genuine signature established.*

3o. *With regard to the counterfeiting of the signature of the person heard as a witness, as the point had not been clearly reserved the Court would not have considered it, had not all the parties dealt with it as if it had been reserved by implication.*

4o. *That there the verdict harmonises with the charge, that the presumption was that the jury believed that it was the signature of that witness which accused had forged, and the possibility of their having believed that it was the name of an imaginary being that had been employed could not be sustained by the Court.*

Accused referred back to Court to be dealt with under the verdict relating to the counter-

feiting of the signature of the witness heard. Verdict relating to other counts, quashed.

IN RE

HOSSEN JAFFAR.

—

Before

His Honor SIR E. J. LECLÉZIO KT.,— Chief Judge.

The Hon. A. MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

The Hon. LOUIS ROUILLARD, Substitute Procureur General, — Crown Prosecutor.

Messrs. NEWTON and GALÉA,—Counsel for accused.

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Record No. 4.

21*st. August* 1888.

This is an information under which the accused is charged under nine counts either with forgery of the signatures of certain named persons or with aiding and abetting certain forgeries, by falsely attesting that he (the accused) had witnessed the signing of the accepted accounts mentioned in the information by the persons named in each count

The substitution of a name that is false or the suppression or alteration of a name or thing that is true is the fundamental element of the crime of forgery. But when a Penal Code details all the crimes, for which the well being of society requires criminals to be punished, that of forgery is limited to certain given and prescribed cases. Our Code, after dealing in Articles 106 and 107 with the crime of forgery by Public Functionaries, proceeds in Article 108 to deal with that crime when committed by other persons, and it is enacted inter alia that " any other person who shall commit " a forgery in a Commercial or Bank Writing, " whether by counterfeiting or altering any " writing, date, or signature or by the use " of a fictitious name "—shall be punished in a certain way. As the present question turns upon the scope and interpretation of the french version of the above words, it may be well to quote them " soit par contre- " façon, ou altération d'écritures, dates, ou " signatures, ou l'emploi d'un nom supposé." As our Criminal Procedure Ordinance requires that the gist of every crime shall be clearly and succinctly stated in the information, and as the charges made against the accused in the present information are counterfeiting the signatures of certain persons, or aiding and abetting some unknown person in counterfeiting the signatures of these individuals, it clearly follows that the person who framed this information meant that the charges should fall under the first branch of the clause above quoted.

But it turned out on the proof that, except in reference to the second and fifth of the charges, the whole forged names of the persons were purely imaginary or fictitious, that the signatures represented persons, who did not exist and who could not be produced at the trial to prove the forgery of their signatures. Nay, it turned out that while the signatures which were written in Urdu characters, were real names which could be read, no fewer than four of the charges which purported to be the names of chinese traders contained the mere appearance of signatures and that, on the trial, chinese experts affirmed that these signatures were not chinese letters at all, but the curves and convolutions of which they consisted were the mere shams and appearances of letters. As to the second and fifth charges, the accused was charged with counterfeiting the signature of one Sayed Hossen of Rose-Hill and a man of that name and residing there was adduced to affirm that the alleged signature was not his, which he did. But the Presiding Judge charged the Jury that if

the forgery was intended to apply to that man, they might convict the prisoner on these counts, but if they did not think he was the man, then this case resembled the others. It is time to notice that our Penal Code, which, in general, is a mere transcript of the French Penal Code, contain words additional to those in the 147 Article of the French Code viz : " ou l'emploi d'un nom supposé."

This being so, the learned Counsel for the defence contended that there was here no counterfeiting of any signature as charged, but the use of a fictitious or imaginary name which was not charged. On the strength of certain decisions of the Court of Cassation in France, by which it was long ago decided that it is of little consequence that the document should be signed by a name purely unreal or imaginary, if the person to be imposed on believed that it emanated from a person really existing, the Presiding Judge charged the Jury that they might convict the accused of the charges before them ; but that he would reserve the question of law for the consideration of the whole Court. In regard to the forgeries in supposed chinese characters, he told the Jury that these were not at all the counterfeits of any signatures, and he directed that the accused should be acquitted on the counts. Notwithstanding, the Jury returned a verdict of guilty on all these counts.

The counsel for the defence then moved that the questions urged by him should be reserved, and the Crown Prosecutor entered on record that he would not move for sentence on the first, fourth, eight and ninth counts, i. e. the counts containing the supposed chinese characters.

Thereupon the Judge framed the following reservations.

" Whether the count charging an accused " with counterfeiting a signature will " cover the case in which it appears that " the signature is only of a supposed person."

" Reserves point also whether a verdict " of the Jury which has been given contrary " to the ruling of the Judge on counts 8 " and 9 can be supported as a whole."

We heard a very complete and learned argument on the mode in which the words " ou l'emploi d'un nom supposé " came to be added to our Code, and their interpretation. It was at first doubted whether these words did not refer to the use of a fictitious name in the body of a document, but from the history of the decisions of the French Courts and from the comments of eminent writers, it appears very probable, in consequence of a continued conflict in France between the Courts of Assize and the Court of Cassation, the former holding that the forgery of an imaginary name did not fall under the words of their 147 Article, while the latter Court quashed all the judgments, that our legislators solved the difficulty by adding the general words in question. They are so general, that they may apply not merely to the forgery of a suppositious name, but also to the use of such a word in the middle of the writing.

This interpretation we consider more natural and more reasonable, even if the ordinary meaning of the words be taken, as it were, absolutely, and without reference to any historic development of their interpretation. The result is that the words of the information should have been framed with reference to the second clause of the paragraph, and that the verdict of the Jury clearly cannot stand in regard to all the counts of the information except the second and fifth.

In regard to these last, there was even a

doubt whether they should stand in consequence of the charge of the Judge above referred to.

But the information bears that the forgeries of these two counts were those of a man called Syed Hossen, of Rose Hill, and the record of the witnesses examined at the trial shows that one Syed Hossen, of Rose Hill was adduced before the Jury. It may be fairly presumed that he was so adduced to prove that the signature to the accepted account narrated in these charges was not his and was therefore a forgery of his name. In other words, that his name was counterfeited and that therefore the charge fell under the first branch of the 108 Article in question. The possibility of the Jury having acted in reference to these counts, under the supposition that the case was similar to the other counts, that is, that the name of an imaginary being had been employed, cannot be sustained by the Court. It is to be remarked that this alternative is less probable than the other. The Jury had evidence of a real person, and no imaginary person, which fulfilled the ordinary meaning of the words in the Court and it is most unlikely that they resorted to a strained and constructive meaning of these so as to arrive at a verdict of guilty. But, in law, it would have been incompetent for us to discuss this question for it does not appear to have been formally reserved. The wording of the first reserved point which can only be referred to clearly applies to the counts in which there is only a fictitious person There ought to have been a clear reservation on the effect of the alternative charge (if we are to take that up). But the parties have dealt with this question as if it was reserved, and as it may be said to be reserved by implication it becomes necessary to give our decision thereon. The verdict harmonises with the charge, and to our mind it is impossible in law to get behind and set aside that verdict. To set it aside, there must be error in the record, of which there is none. As Archbold, in his work on Criminal Pleadings, speaking of procedure after verdict, says (P. 183 19 Edition). "This motion can be "grounded only on some objection arising "on the face of the Record itself, and no "defect on the evidence, or *irregularity at "the trial,* can be urged at this stage of "the proceedings." The case is altogether different from those in which there is a discrepancy between the indictment and the verdict, or an ambiguity on the face of the verdict. In such cases the verdict cannot stand, but in the present case the verdict is conformable to the charge, and to what took place according to the Record, and there is no discrepancy, no variance, and no conflict between them. The presumption undoubtedly should be that the Jury believed the witness Syed Hossen, and the verdict therefore meets the justice of the case. That being so, we think that though the direction of the Judge might have been partially incorrect, there is no ground for holding the verdict of the Jury on these counts to be bad. It is the commonest event in the world in Jury trials that the Presiding Judge places alternative and even opposing views before a jury, but if the Jury come to a verdict, we have never heard that that fact justified the holding of the verdict of the jury to be null. No authority has been quoted to us and a diligent search has failed to discover any case in which that has been done. If it were competent, without error in the record, to hold the verdict bad on the ground of an alternative view in the charge of the Judge, it is unlikely but that many such cases would have occurred, and been argued in the Courts. But there are none such. In fact, all that could be said on behalf of the accused on these counts has been pleaded to the jury, and they have nevertheless seen cause to find a verdict of

guilty against him. It is a good conviction and one which it would be "ultra vires" of the Court to question or disregard.

We are compelled then to conclude that the present verdict on the second and fifth charges is sound, and cannot be disturbed.

We therefore quash the verdict of the Jury on all the counts, except the second and fifth counts, and we remand the accused to the presiding Judge to proceed with the case on these two counts.

SUPREME COURT

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TARDY ARRIVAL OF GOODS—BILLS OF LADING—THEIR CONSTRUCTION—LIABILITY OF COMPANIES — INDIRECT DAMAGES — RIGHT TO REFUSE TO TAKE DELIVERY—MEASURE OF DAMAGES—DEPRECIATION ON MARKET—DAMAGES —COSTS.

Plaintiff shipped goods in France by a designated monthly steamer and they arrived in Mauritius by the mail steamer of the following month only.

Plaintiff refused to take delivery and entered the present action in damages.

By the Court:

1o. *The terms of the bill of lading, which should be construed with absolute strictness, do not exonerate the Defendants from responsibility when goods are accepted for one vessel and despatched by another and a later ship.*

2o. *They do not, however, admit of a claim for indirect damages for delay or for greater damages than would be consequent upon the absolute loss of all the goods, when the Company would be liable only for the cost price of the articles shipped.*

3o. *Though many of the goods were ordered for a special occasion, which had passed by upon their landing, this was not sufficient to justify their total abandonment.*

4o. *The measure of damages for delay should not be the profit that might have been made upon the goods, if delivered in time, but the actual depreciation in the market value between the date at which they should have been delivered, according to the contract, and that of their actual arrival.*

Plaintiff allowed 20 o/o *as the above average depreciation, and half his costs as he had been only partially successful.*

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LE GLANEUR,—Plaintiff.

and

THE MESSAGERIES MARITIMES COMPANY,—Defendants.

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Before

His Honor Sir E. J. LECLÉZIO KT.,—Chief Judge.

His Honor A. MURE,—Puisne Judge.

and

His Honor F. C. WILLIAMS,—Puisne Judge.

—

V. DELAFAYE,—Counsel for Plaintiff.
F. MALLET—Attorney for the same.

L. CHASTELLIER,—Counsel for Defendants.
E. DUVIVIER,—Attorney for the same.

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Record No. 24,273.

21*st. August* 1888.

In this case the Plaintiff shipped goods by a designated monthly mail steamer, and they were carried and delivered by the mail steamer of the following month. He claims damages for the delay, and the answer is that there is no local precedent for such a claim, and that the terms of the bill of lading signed by both parties are adverse to it. The terms of the bill of lading, in the opinion of the Court, should be construed with absolute strictness. We do not find in so construing them, that they exonerate the company from responsibility where goods

are accepted for one vessel and despatched by another and a later ship. But still, construing the bill of lading's terms strictly, we do not, on the other hand, think that they admit of a claim for indirect damages for delay, or for greater damages than would be consequent upon the absolute loss of all the goods, in which case, these clauses limit the liability of the company to the cost price of the articles shipped. The plaintiff upon non receipt of the goods by the steamer for which they were shigped in Paris took the attitude of abandonning the goods and taking recourse to law for their value. It is contended that the goods should not have been absolutely abandoned. It is certain that many of them were ordered for a special occasion. That occasion had passed by upon their delivery, and their value to the consignees was consequently much depreciated.

But this is not sufficient, in our view, to justify their total abandonment, more especially as there is no doubt that they arrived here in good condition, though a month after they were due, and that they are in the same good condition now. The important question for the Court is as to the measure of damages which should be allowed. to the Plaintiff for the delay complained of, and for which we find that the defendant company is liable. A good deal of evidence was led as to the profits which might have been made upon these goods had they arrived in time for the Christmas and New year's sales. Upon this point, we incline to the view taken in an English case (Wilson v. Lancashire and Yorkshire Railway Company L. J. N. S. Common pleas, Vol. 30 p. 232) that the measure of damages for delay should not be the profit that might have been made upon the goods if delivered in time, but rather the actual depreciation in the market value between the date when they should have been delivered according to the contract and that of their actual arrival. In that case, Mr. Justice Williams said. "There are two questions in cases like the "present; the one is, whether, where the "carrier has been guilty of negligence and "delay in delivering goods, the consignee is "entitled to recover the profits he would "have made if the goods had been delivered "at the proper time—as to that, we are of "opinion that he is not. The other question "is whether he is entitled to recover the "difference between what the value of the "goods would have been if they had been "delivered at the proper time and what the "value of them was when they actually "were delivered. Now, we are of opinion "that the consignee is entitled to recover "that. It seems to me that if it were otherwise, injustice would be done, because, to "put a familiar case, a tradesman at a "watering-place orders a quantity of ribbons, which, if there were no delay in the "delivery by the carrier, would reach him "at the beginning of the season; suppose, by "delay through the negligence of the carrier, "that the ribbons are not delivered until after "the season is over, the consequence would "be, that the time would have passed when "the tradesman would have a ready market "for them, and the consequence would, "probably, be an actual loss in their value. "It seems to me that it would then be unjust "if, in such case, the carrier were not made "answerable for such loss."

Acting upon this view, we have fixed twenty per cent as the average reduction in market value of the goods now in question caused by the month's delay on their arrival here; that is to say, we think that twenty per cent represents their depreciated value after the Christmas and New year's season had passed. Our judgment is consequently for the Plaintiff for delivery of the goods and for six hundred and fifty six Rupees and twenty one cents, as damages and as

the plaintiff has only partially succeeded in establishing his claim and as he has failed upon the point of his right to abandon the goods, we think he is only entitled to half the taxed costs of the action.

SUPREME COURT

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ORAL EVIDENCE—COMMERCIAL PARTNERSHIPS—ARTICLES 39 AND 40 CODE DE COMMERCE—WRITINGS—PURCHASE OF MOVEABLES—BEGINNING OF PROOF IN WRITING—ORAL EVIDENCE ADMITTED.

Plaintiffs asked leave to prove, by oral evidence, that the title and plant of a certain newspaper adjudged at a public sale to A, had been purchased by A for himself and certain other old shareholders of the paper, and that their common object was to continue to work the paper.

Defendants objected to parol evidence, because:

1o. *A commercial partnership, in name collective or anonymous, can be established only by a deed.*

2o. *A promise or agreement to form a partnership can only be proved by writing.*

Held, by the majority of the Judges:

1o. *That the main object of the plaintiffs was not to seek to set up a deed of partnership with all its clauses, but merely to prove that certain moveables are the common property of Plaintiff and Defendants, as being partners of a dissolved society.*

2o. *That there was here a beginning of proof in writing that the purchase had taken place for A and some of the old shareholders and that oral proof was, consequently, admissible.*

Rouillard J. contra.

1o. *The agreement which is alleged to have taken place between the parties cannot be split into two parts, the purchase was part of a whole scheme, and that scheme was the formation of a partnership.*

2o. *By Articles 39 and 40 (Code Com:) commercial partnerships, in name collective or anonymous, and agreements to form such partnerships must be established by writings.*

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TOURRETTE AND ORS,—Plaintiffs.

and

DARDANNE AND ORS,—Defendants.

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Before

His Honor A. MURE,—Puisne Judge.
His Honor F. C. WILLIAMS,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

H. GALÉA,—Counsel for Plaintiff.
A. DE COMARMOND,—Attorney for the same.

W, NEWTON,—Counsel for Defendants.
H. BERTIN,—Attorney for the same.

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Record No. 24348 Bis.

21*st. August* 1888.

JUDGMENT

Delivered by Mr. JUSTICE MURE.

To arrive at the proper conclusion to which the Court should come on the question whether the Plaintiffs are or are not entitled to oral proof, we must consider the conclusions of the declaration and the averments on which these are founded. The conclusions are (first) that the printing Establishment and Newspaper the *Cernéen* together with its sundry debtors, stock, and appurtenances of every kind, is the joint property of the Plaintiffs, defendants and co-defendants, as shareholders of the late anonymous *Société du Cernéen*; (second) that the partnership existing actually between Miss Boussiron and

Arnold Dardanne is null and void, and (third) that the defendants should give an account of their management of the *Cernéen*.

It is evident that the leading conclusion here is that the Plaintiffs, defendants and co-defendants are joint proprietors of the *Cernéen* as shareholders of the former anonymous *Société du Cernéen* and that the other conclusions are subordinate to the first, and to succeed on them it will be necessary for the Plaintiffs to obtain a finding in their favour on the first conclusion.

In support of the first conclusion, the important averment in the declaration will be found in the third count thereof, in which after narrating in the previous counts the existence of the anonymous Society of the *Cernéen*, and its coming to an end on the first day of May eighteen hundred and eighty two, its liquidation and the putting up the paper for sale and the agreement between the old shareholders and Jardin that the latter should purchase the *Cernéen* for the account of the late shareholders, it is alleged that the paper with its appurtenances were sold by public auction, and awarded to Désiré Jardin for the account of the shareholders of the late *Société du Cernéen* for a certain price.

It is observable that, hitherto, there is not a word in the first conclusion, nor any averment in the allegations of the Plaintiffs, which has reference to a future partnership, or to the conditions on which it is to be established. There is an averment as to the past partnership, and the purchase of its property for the common account, and if these averments are sufficiently proved by competent evidence, there would be enough to entitle the Plaintiffs to succeed in their first conclusions.

It is true that the declaration proceeds to aver that instructions were given to Notary Raoul to prepare a new deed of the anonymous *Société du Cernéen* and that the deed was handed over to Jardin the then Manager and Editor of the *Cernéen* in order that he should communicate it to the shareholders who would be called on to sign the same so as to save time—that he died in September 1886, and that the new deed of society was either *mislaid* or lost. But, though these allegations are made, not a word is said as to the conditions, the duration and the capital of the new partnership, and no attempt is made to compel any one to enter into that new partnership or to set it up as a binding deed in any form. It is true that the defendants, in their argument against the right of the Plaintiffs to proceed by oral evidence, alleged that the basis of the Plaintiff's position was an allegation that the new partnership was to be formed for the working to the paper, and that it was incompetent to prove this by parole testimony.

But nowhere, either in the declaration or in the replication lodged in process for the Plaintiffs, is there any allegation of the terms of the new partnership or the mode in which it was to be conducted, of the managers who were to be entrusted with the management and, above all, no statement is made of the number of shares into which the new Anonymous Company was to be divided. So far as can be gathered, not one of the constituents of the simplest deed of anonymous partnership could be taken from the Plaintiff's averments so as to appear as an article or condition of the new deed.

It is true that in the notice of facts to be proved for the Plaintiffs, which has not been very happily framed, and which gives a colour to the very confident argument of the defendants, there is an unfortunate frequent use of the words Partnership, deed of partnership and renewal of the old partnership. As for the latter matter, almost in the same sentence it is alleged that there were minors who had succeeded to the rights of deceased partners, but were

by their minority under disability, and therefore the renewal of the old partnership was a matter of impossibility. Then, generally, the supposition that the Plaintiffs propose to prove a partnership, or even a promise of that contract, is a mere outside appearance of things, and has really no existence.

There is no doubt that if the Plaintiffs proposed to prove the validity of the deed of partnership said to have been drawn up by Raoul or even to set it up as a promise of partnership, they would be met by formidable difficulties.

The 39th. and 40th. Articles of the Code of Commerce enact that co-partnerships in name collective must be established by public or private deeds, while Anonymous Partnerships can be constituted only by public deeds. In commenting on these Articles of the Code, it appears that some commentators hold that a promise or agreement to form a partnership can only be proved by similar writings.

There is much sound sense in this view, for a promise of Partnership, which contains all the elements for carrying on a business and all the conditions of the conventions between the parties, is in truth equal to a formal deed of partnership. This state of the law is confirmed by a judgment of the Court of Toulouse reported in S. V. 1878.2.169 in which two persons had purchased a place of business with the intention of working it in common, one of them managed the business and was pursued by the other, who, asserting that there had been a promise to form a partnership "en nom collectiff" under conditions verbally fixed, asked of the Court to decree that the deed of Partnership should be extended with these conditions inserted therein, and that all the legal formalities should then be gone through. This short statement is enough to show that the decision is not analogous to the present case but is a contrast to it. The Plaintiffs do not seek to set up a deed of Partnership with all its clauses, but merely that certain moveables are the common property of Plaintiffs and Defendants, as having been partners of a disolved society. I am of opinion therefore that the case of Toulouse does not apply to the present one, and is of no authority as regulating the procedure which is to be had in it. Indeed, the very report of the decision contains within itself proof of the distinction which I wish to draw, for it says: "sans doute on peut concevoir, en droit, "une promesse de société ayant une valeur "juridique en dehors et indépendamment "du fait social, comme toute promesse qui "engage généralement celui qui l'a faite, "mais si l'engagement qui en résulte doit "avoir pour effet la réalisation d'une société "légale, il faut reconnaître que la promesse "de société se confond dans son existence "juridique avec la société elle-même."

But there remains the question, supposing that the Court restricts the present enquiry to a case of common property and a mere purchase for a possible future partnership the conditions of which were to be the subject of future negotiation, is it competent to admit parole evidence to prove these facts?

The answer must be that as the value of the subject exceeds 150 francs, parole proof is in itself incompetent, unless there be a "commencement de preuve part écrit." The committee of management of the old company having resolved to liquidate and to wind up the concern, the sale took place on the thirty first July 1882, and was adjudged, as the minutes bear, to Désiré Jardin on account of the old shareholders. The next day, on the first August 1882, an announcement is made in the *Cernéen* which undoubtedly emanated from Jardin, and is equivalent to his writ, in which he announced the sale and published

that it was adjudged to him " pour compte " des actionnaires qui avaient adhéré au " renouvellement de l'acte de société." It is said that this points to a partnership in contemplation being formed. No doubt of it, but it does not say one word as to the conditions of the new Partnership; the capital, the number of shares, the duration of contract are all left in darkness, and the juridical fact remains that Jardin purchased not for himself personally, but as a shareholder of the Old Company, and hoping to see a resuscitation of a new one. He was, so to speak, a trustee for others, and I do not see my way to prevent proof of that fact, and the various circumstances which accompanied it, reserving to myself to form a decision upon the case when the proof on both sides has been led. If we refuse that proof, the result will be that Jardin would remain sole proprietor of the *Cernéen*, a state of matters, which was never intended by himself nor by the other parties interested in the *Cernéen*.

I am therefore of opinion that the notice of facts should be allowed and that subpœnas should issue, in so far as these facts refer to the alleged right of common property and the other facts having connection with that right. But I refuse the proof asked for, in so far as the facts sought to be proved would establish the constituant elements of a new Partnership, and whatever would tend in that direction.

Costs reserved.

JUDGMENT

Delivered by Mr. JUSTICE WILLIAMS.

After a careful consideration of the issues involved in the application before us in this case, I have arrived at similar conclusions to those enunciated by my learned brother the Presiding judge. If the question were one as to the nature of a partnership either declared or anonymous, or of the terms upon which such a prospective partnership was to be formed, there is no doubt that Articles 39 and 40 of the "Code de Commerce" would apply, and that we could admit none but the evidence afforded by public or private writings. But what is sought to prove here, is, that upon a certain day, a particular property was purchased by Jardin, not on his own account, but on the behalf of others besides himself, and that, in fact, the property of the *Cernéen* is in the joint ownership of certain parties who have not yet, whether through confidence in the management, or through neglect of their own interests, entered into a partnership to work it. Of this fact, that the purchase of the *Cernéen*, in 1882, by Jardin was in the common interest of himself and others, Jardin's own admission in the issue of the newspaper of the first August 1882 certainly seems to afford the " *commencement de preuve* " *par écrit*" required by Article 1347 of the Civil Code; and so long as oral evidence is restricted to that fact, and no question is raised (as in the Toulouse case) respecting the terms upon which the purchased property was to be worked in common, I think that oral evidence of it is admissible.

JUDGMENT

Delivered by Mr. JUSTICE ROUILLARD.

In order that the true position of the parties in the present case should be fully understood, it will be necessary to give a short summary of the events which have preceded this action.

On the 15th. May 1862, an anonymous partnership was formed for the working of the newspaper *Le Cernéen*. During the few weeks which preceded the date at which the partnership was to come to an end, an attempt was made to continue the partnership between the same shareholders. At a meeting of the directors of the *Cernéen* which took place on the 1st. May 1882, the

late Mr. Jardin stated that a great number of the former shareholders had given their consent in writing to the scheme. The attempt, however, to prolong the partnership or to renew it between the same shareholders failed. Twenty years had worked great changes in the position of the shareholders. A certain number of them had died. Their shares had fallen to minors who could not enter into valid contracts. It was then resolved, at a meeting of the directors held in the beginning of July 1882, to proceed to the liquidation of the partnership according to the mode provided for in the deed of agreement. On the 31st. July 1882, the *Cernéen* was put up for sale and Mr. Jardin, the highest bidder, purchased it for the sum of 12,000 Rupees. On the next day, the following announcement appeared in the *Cernéen*.

" Conformément à l'avis qui a paru dans " les journaux depuis un mois, le *Cernéen* a " été mis en vente publique aujourd'hui et " adjugé à Mr. D. Jardin pour compte des " actionnaires qui avaient adhéré au renou- " vellement de l'acte de société. Il n'y aura " rien de changé dans la direction du Journal." Although the announcement was not signed by Jardin, and he was then only the sub Editor of the paper, the defendants who are Jardin's representatives fully accept the statement as if it emanated from Jardin himself.

Jardin died in September 1886. During the interval of upwards of four years which elapsed between the purchase of the paper and the death of Jardin, he stood before the world as the owner of the *Cernéen*. Actions were brought against him in his own name.

There never was any meeting of shareholders, past or present, nor of any board of control. He found the money himself for working the business, and there is no indication that any one interfered either in the management of the *Cernéen* or disturbed Jardin in the quiet possession of the concern.

After Jardin's death, the *Cernéen* devolved on his heirs, who managed the paper in the same way as Jardin had done, and it was only one year after Jardin's death when a deed of partnership was made between some of his heirs, that the plaintiffs, some of whom were original shareholders of the *Cernéen*, whilst others hold their shares by purchase, have raised the present action.

The plaintiffs ask the Court to declare that they are, together with the defendants, owners of the *Cernéen*. They found their claim on an agreement which, as they allege, was made between the shareholders of the late co-partnery and Désiré Jardin now deceased, to the effect that when the *Cernéen* would be put up for sale, Jardin would purchase it for the account of the shareholders of the co-partnery. It must be remarked that this allegation of plaintiffs does not refer to the scheme to continue the partnership, as explained by Mr. Jardin at the sitting of the 1st. May 1882, but to a distinct agreement which is said to have been made after the first attempt had failed.

There is no written record of this alleged agreement, and plaintiffs ask leave of the Court to prove it by oral evidence.

The difficulty against which plaintiffs have to contend, arises from the special provisions of Articles 39 and 40 or the Code of Commerce, which enact that commercial partnerships "en nom collectiff" can only be proved by public or private writing, whilst in the case of anonymous partnerships the proof must be made by a public writing (écrit public). As a consequence of the principle set forth in the above Articles, it is held generally that a promise or agreement to form a partnership "en nom collectiff" or an anonymous partnership can only be proved by writing (See Paul Pont. Sociétés Vol. 2 page 231). The same doctrine is laid down in a decision of the Court of

Toulouse reported in S. V. 1873. 2. 169. There seems to be no contrary decision.

It is true that some of the principles laid down in the above judgment are adversely criticized by an able jurist (Mr. Labbé) but his conclusion is that, although in some cases the agreement to form a partnership may be proved by oral evidence, the failure to form the partnership can only give rise to a claim for damages. This difficulty was felt by the plaintiffs and they tried to obviate it in several ways. They urged in the first place that the agreement between the parties might have referred to a "Société Commerciale en participation" the proof of which in terms of Article 49 of the Code of Commerce, need not be made by writing.

I do not think that the carrying on of a newspaper such as the *Cernéen*, can be the object of a "Société commerciale en participation." The Code of Commerce, Article 48, speaks of these partnerships as having for their object "une ou plusieurs operations "commerciales." Paul Pont (Sociétés Commerciales) seems to me to have clearly defined the law on this subject. He expresses himself as follows: "Quand les parties se "sont associées en vue d'une exploitation "constituant un commerce fixe et continu, "embrassant par conséquent un ensemble "d'affaires et sans limitation, et toutes les "opérations qui pourraient se présenter, il y a "autre chose entre elles que la participation."

But, apart from the legal aspect of the question, when it is considered that the object of the agreement alleged to have been made between Jardin and the shareholders of the *Cernéen*, was the working of a newspaper, how can it be supposed that the parties should have selected a form of association in which there is no "raison sociale", no social signature" not even a "siège social" instead of one of the modes of commercial partnership usually adopted in the Colony.

With reference to the objection that an agreement to form a commercial partnership otherwise than "en participation" cannot be proved by oral evidence, the learned counsel for the plaintiffs contended that the agreement which had taken place between the plaintiffs and the late Mr. Jardin was twofold.

In the first place, there had been an agreement to buy the paper and next, an agreement to work it. Whilst the learned counsel admitted the difficulties which arise with reference to the latter agreement, he urged that Articles 39 and 40 of the Code of Commerce did not apply to the first agreement concerning merely the purchase of the paper.

In my opinion, the agreement which is alleged to have taken place between the parties cannot be split into two parts.

The purchase of the *Cernéen* was part of a whole scheme and that scheme was the formation of a partnership to carry on the paper.

The only written document on which the plaintiffs can rely is the announcement made in the *Cernéen* on the 1st. August 1862 that Mr. D. Jardin had purchased the *Cernéen* "pour compte des actionnaires qui "avaient adhéré au renouvellement de l'acte "de Société." Taken in connexion with the notice of facts, in which the plaintiffs intimate their intention of proving an agreement that Jardin would purchase the *Cernéen* for their joint behoof, and that a new partnership would be formed for the working of the paper, this announcement has a clear meaning. It indicates that between Jardin and several persons not named, an agreement for forming a new partnership had been come to and that the *Cernéen* had been purchased in furtherance of the scheme for the account of those with whom the agreement had been included. In order that those persons should have any vested right

to the *Cernéen*, they must prove that they were parties to the agreement relative to the formation of a new partnership. We are therefore led to an enquiry into the conditions of a proposed partnership, its duration, its capital, the number of shareholders, their liability, the management of the paper &c., &c. All this would have to be proved by oral evidence and there would be this particular feature to the case, that the party against whom that evidence involving so many details would be led, is now dead and that it would be practically impossible to contradict the statements of plaintiffs.

I do not think that it would be competent for the plaintiffs to found their claim to part ownership of the *Cernéen* on a general agreement to form partnership, leaving its terms to be determined at a subsequent period. Such an agreement would be meaningless and could not confer any right. The learned counsel for plaintiffs also suggested that the parties might have contemplated what he called a "Communauté." It is however clear that, if the agreement was to buy the paper in common and to do nothing with it, as it would be a civil contract, it could not be proved by witnesses against the provisions of Article 1341 of the Civil Code. On the other hand, if the agreement was to work the newspaper in common, then it would become a commercial undertaking, and again Articles 39 and 40 of the Code of Commerce would apply. In short, whatever may be the view taken of the agreement alleged to have been made between the parties, our Law as to the admissibility of oral evidence, prevents the plaintiffs from ushering in witnesses in proof of their contention.

This ruling disposes at once of nearly all the subsidiary questions raised in the notice of facts of plaintiffs. The facts which they notify the intention of proving, namely: the instructions given by Jardin to Mr. Notary Raoul, the statements made by him, the alleged "pourparlers" between the heirs Jardin and the plaintiffs about the sale of the paper, the instructions given by them to a Notary, might have been offered in proof in corroborarion of the agreement between Jardin and the plaintiffs, but as the main agreement is not provable by witnesses in the present circumstances, I must apply here the same principles as I did to the agreement above referred to.

With respect to the "bordereau" signed by Mr. de Froberville and setting forth a sale of the *Cernéen* to the late Mr. Jardin, as it was not signed by Mr. Jardin, it cannot be used as evidence against the representatives of the latter.

Lastly, I do not think that evidence is admissible, in the present state of matters, with reference to the deed of partnership, which, as alleged by plaintiffs, was prepared by Mr. Notary Raoul in pursuance of instructions from Mr. Jardin and which is said to have been signed by a certain number of the former shareholders of the *Cernéen*. That document is not forthcoming, and the plaintiffs should have stated in a more precise manner the "cas fortuit, imprévu et "résultant d'une force majeure" (Article 1348 C. C.) which resulted in its loss or disappearance.

SUPREME COURT

APPEAL FROM DECISION OF DISTRICT COURT—PARTNERSHIP—SUBSTITUTION OF REPRESENTATIVES—CASE STRUCK OUT—PRELIMINARY OBJECTIONS — INTERLOCUTORY JUDGMENT — AMOUNT AT ISSUE—FINALITY OF THE INTERLOCUTORY ORDER—REAL POINT AT ISSUE—OBJECTIONS OVERRULED—COSTS.

A Partnership sued a certain person before a District Court, and a motion having been made for substituting A to B, as representative of

the said partnership, the Court refused the application and struck out the case with costs.

The partnership having appealed, two preliminary objections were taken :

(*a*) *The Judgment appealed from was an interlocutory, not a final judgment.*

(*b*) *The amount at issue i.e. the costs to be paid by appellant, was under £ 20.*

The Court ; with regard to (*a.*)

1o. *By refusing to non-suit the plaintiff, the Magistrate had placed him in the impossibility of moving for a dismissal of the case in order to appeal.*

2o. *The order of the Magistrate to strike out the case has given it a character of finality.*

With regard to (*b.*)

The real matter at issue here is not the question of costs which plaintiff has been ordered to pay, but the amount claimed from the defendant in the principal action itself.

The two objections overruled, the respondent condemned to pay costs of the present incident, the appeal to be proceeded with on its merits.

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THE ENGRAIS MAURICIEN COMPANY,—Appellants.

and

MAURICE,—Respondent.

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Before

His Honor Sir E. J. LECLEZIO Kt.,—Chief Judge.

and

His Honor A. MURE,—Puisne Judge.

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P. L. CHASTELLIER,—Counsel for Appellants.
A. COLIN,—Attorney for the same.

V. DELAFAYE,—Counsel for Respondent.
G, BOULOUX,—Attorney for the same

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Record No. 905.

30*th. August* 1888.

JUDGMENT

Delivered by His Honor THE CHIEF JUDGE.

This is an appeal from a judgment of the District Court of Port Louis in a case in which the sum of Rs. 900 was claimed by the Engrais Mauricien from Mr. Maurice. When the case was called before the District Magistrate, the plaintiff moved that the name of the manager of the partnership should be changed, that instead of Mr. Joly being named in the summons to represent the partnership, it should have been Mr. de Pitray, who was the acting Manager. An objection was raised before the Magistrate to that change in the name of the Manager of the partnership and the Magistrate sustained that objection. This is the decision given by him. "The Court is of opinion that when a "company sues under the name of a person "who is not manager it is not properly "represented. The plaint is not in a proper "shape before the Court who cannot subs-"titute one plaintiff to another. Therefore "the plaint is struck out with costs."

An appeal has been made from the decision of the Magistrate refusing the amendment which was proposed at the outset of the case when it was called before him. This appeal was objected to on two grounds, the first ground is that the judgment of the Magistrate is not final, and the second ground is that the matter at issue between the parties upon the question of appeal now before the Court is under £20, or Rs. 200. With regard to the first ground, it was stated to us that the judgment of the District Magistrate refusing the amendment was purely and simply an interlocutory judgment, and that the Court had always held that no appeal could lie from those interlocutory orders.

However, it was replied that the interlocutory judgment of the Magistrate refusing the amendment had become final by the last

order given by the Magistrate which was to the effect that the case be struck out with costs, that the striking of the case, in fact, placed the plaintiff in the impossibility of moving further, or proceeding with the hearing of his action on the merits; because if he was to replace the same action, even with the consent of the other side, on the Cause List of the District Court, he would find himself in exactly the same position, because the Magistrate would again refuse the amendment which he had prayed for. We have not to express an opinion on the merits of the appeal itself; that is to say, whether the Magistrate was right or wrong in refusing the amendment, but we have no doubt that the last order given by the Magistrate has given a character of finality to the interlocutory judgment which was pronounced by him. The defendant in the case had merely moved that the plaintiff be nonsuited. This was refused by the Magistrate, and by refusing that order of nonsuit he placed the plaintiff in the impossibility of moving for the dismissal of the action in order to allow him to appeal, his order was that the case should be struck out with costs.

Now, we consider that such an order, under the circumstances, preventing the plaintiff from moving further in the matter has become a final judgment from which an appeal can lie. There are cases in which the Court has ruled in the same sense. Not very long ago, in the case of Alexandrine v. Chaillet, we decided that an interlocutory judgment given by the Magistrate had, by the striking out of the case itself from the list of his Court, acquired a character of finality, and that therefore the party who felt himself aggrieved, might appeal from that judgment. We think that the circumstances of the case, although not exactly the same as those of Alexandrine v. Chaillet, allowed the plaintiff to consider that the order of the Court had become final, to such an extent as to prevent him from proceeding further and that, therefore, on that account he was entitled to appeal from the judgment of the Magistrate.

With regard to the second point, it was stated that the Magistrate not having pronounced on the merits of the case itself; that is to say, the demand before him of Rs. 900, the matter in dispute between the parties was below £20 or Rs. 200, because the costs to which the parties had been put in this case did not amount to Rs. 200, and, therefore, on that account, that we should consider the amount really in dispute between the parties was below the appealable amount. We think that this objection is not tenable at all, because the real matter at issue between the parties in the action brought before the Magistrate was not that question of costs to which the plaintiff was condemned by the Magistrate when he refused the amendment, but the amount which was claimed by the plaintiff from the defendant in the principal action itself.

We, therefore, think that the two objections taken to this appeal should be overruled and that the appeal should be heard on the merits.

We think also that the appellant is entitled to the costs of the incident which has taken place before the Court.

Subsequently the court allowed the appeal & quashed the decision of the District Magistrate inasmuch as the [illegible] was the real plaintiff & not the [illegible].

SUPREME COURT

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CERTIORARI—BANKERS BOOKS EVIDENCE ACT—BANKS IN LIQUIDATION—BANK CANNOT BE CALLED TO PRODUCE ALL ITS BOOKS—ALLEGATION DIFFERENT FROM THE CHARGE MADE—MOTION REFUSED.

A complainant before a District Magistrate having moved that all the Books of a Bank kept during 12 years should be produced and having failed in his motion, moved the Court for a writ of certiorari to have the

Magistrate's decision dismissing his complaint reviewed.

Held by the Court:

1o. *That the provisions of the Bankers' Books' Evidence Act of* 1879, *apply to Banks which are going concerns, making regularly certain returns required by law, with numerous transactions taking place daily, and numerous references to make each day to previous entries in books, and not to Banks in liquidation.*

2a. *That, however, the application of the complainant that the Bank should produce all their books in order to enable him to hunt up evidence of an alleged misdemeanor supposed to have been committed twelve years ago and to make an inquisitorial investigation into the general affairs of the Bank was unprecedental and untenable.*

3o. *That that evidence, even if procurable, would be inadmissible, for it would not support the charge as laid, in as much as the charge was one of personal interference with the freedom of bidding at a judicial sale, by means of threats and gifts, and that the allegation now was that it was a third party who had used the threats and made the gifts on behalf of the party charged.*

Motion refused with costs.

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CRÉCY DE LANUX,—Appellant.

and

FERGUSON AND V. A. ESNOUF, JUNIOR DISTRICT MAGISTRATE OF PORT-LOUIS,—Respondents.

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Before

His Honor A. MURE,—Puisne Judge.

and

His Honor JOHN ROUILLARD,—Puisne Judge.

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Messrs. Y. JOLLIVET and O. LAURENT,—Counsel for Appellant.

PITCHEN,—Attorney for the same.

W. NEWTON,—Counsel for Respondents.

Hon. H. LECLÉZIO,—Attorney for the same.

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Record No. 24,551.

30*th. August* 1888.

This is a motion for a Writ of Certiorari under which a private prosecutor seeks to review the judgment of the District Magistrate of Port Louis dismissing the charge brought against the Respondent. An application of this nature is generally made in an ex-parte fashion and is usually granted if some cause is shown by the applicant. In the present instance, however, the applicant voluntarily gave notice to the Reapondents of his motion, and the Respondent having appeared, we heard a full argument on the merits of the motion, and as we do not think that a perusal of the depositions in the lower Court and the proceedings there, with a second argument, can add anything to our knowledge of the grounds upon which this case will fall to be decided, it may be well to dispose now finally of the matter.

From the applicant's affidavit which very fully states the grounds of the application, it appears that he recently charged the Respondent, the Honorable John Alexander Ferguson, with having on the ninth of April 1876, at that time being Manager of the Oriental Bank Corporation now in liquidation, wilfully, unlawfully and maliciously, at the time of and before the final adjudication of a real property viz: *Walhalla, Tamarin* and *Magenta,* by threats, promise and gift, prevented a person from making an outbidding, to wit: did threaten, and did next promise, and afterwards give to one Elysée de Roquefeuil de Labistour the sum of Two hundred Rupees during several years, in order to prevent the said Labistour from making, pending the delays prescribed by

Law, an outbidding on the price for which the Estate had been first adjudicated to one Lagesse.

This charge was founded in the 337th. Article of the Penal Code, which makes it a misdemeanor to impede the freedom of judicial auctions and which enacts that those who, by gift or promise, shall prevent any person from bidding, shall be punished in a certain manner.

It is explained by the Commentators on the French Penal Code, from which the clause in our Code is borrowed verbatim, that this criminal charge arose out of the political troubles of France, and that the sale of the national and confiscated estates during the Revolution having raised great opposition which was manifested either by open violence or manœuvres likely to produce a failure of the sale, it became necessary for the legislation to intervene to protect freedom of Judicial sales. It is clear that the part of the Article relied on in the present charge partakes of the nature of a fraudulent manœuvre to impede the freedom of sale, and it follows that the act charged must be personally done by the party charged.

The question discussed before us turned on the points, whether the applicant was entitled to have produced the Books of the Oriental Bank Corporation from 1875 to 1885 viz: the Day Book, the Current Deposit Ledger and the Ledger A. to Z. of the discount progressive and the monthly Balances of Progressive Ledger from 1875 to 1885.

It is to be noted that the applicant does not ask production of documents to prove any particular item or items in one or more accounts, but the Books of the Bank in a complete form for ten years.

Before dealing with this claim on its proper ground of law, it is right to say that we cannot sustain an argument submitted to the District Magistrate and repeated also in our Court, that the Bank was priviledged in respect of the provisions of the Bankers Books Evidence Act of 1879. That Statute assumes that the Bank which claims the privilege is a going concern, making regularly certain returns required by Law, with numerous transactions taking place every day, and numerous references to make each day to previous entries in the Books. As the books sought to be produced are those of a Bank now in liquidation and which has virtually ceased to exist as a Bank, the Court cannot sustain the view of the Respondent in this respect and hold that the books are exempt from production on the ground of privilege under the statute.

But, none the less, does the present claim of the applicant appear to the Court to be extraordinary and unprecedented. A private prosecutor seeks out of his opponent's hands and possession, for the express purpose of enabling him to hunt up evidence of an alleged misdemeanor supposed to have been committed twelve years ago, the whole of his books that he may make an inquisitorial investigation into the general affairs of the Bank; for the applicant does not limit his claim in any way. If he had proceeded in making the charge on any confident ground, he would have been able to allege the existence in certain accounts of the item of two hundred Rupees referred to in the charge, and he might have been entitled to trace that payment of a particular sum through various hands till it reached the party alleged to have been hindered to make the outbidding. But this is not even asked for, and in lieu of that, a claim is made which, if it were granted, would enable the applicant to use the Books for many purposes besides this prosecution. It is a motion then which in itself the Court cannot admit, and must hold to be utterly unfounded.

But when the affidavit is further consi-

dered, it is quite apparent that the charge as made is irrelevant, and that the evidence sought to be obtained to support it is, therefore, inadmissible. The applicant's case is, that Labistour received the sum of two hundred Rupees for many months from Mr. Langlois whom he alleges to be the agent of the Respondent, and he argues that he is entitled to get at the evidence sought for in order to prove the agency. But if that be the state of the facts, the evidence would not support the charge as laid, which is not one of stimulating and facilitating, by providing the means thereof, the perpetration of the crime as an accomplice, but contains a direct charge. The evidence therefore would be irrelevant.

The affidavit further alleges that the Magistrate decided against the evidence, but an explanation is made showing that our previous remark applies to this part also of the applicant's case. In appeals under the District Court Criminal Ordinance, only points of Law can be taken up by the Court. As an appeal is open only to a party convicted, that method of review is not competent to the applicant. But as the Magistrate has given here a decision upon the facts, we think it would not be expedient to proceed on any other grounds than those of Law.

Further, the affidavit contains no statement of the facts, so that we are unable to form any opinion upon them.

For those reasons, we have no hesitation in refusing the present application with costs.

SUPREME COURT

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APPEAL FROM CONVICTION—INFORMATION AMBIGUOUS— DEPOSIT— TRUST — ARTICLE 333 P. C.—INFORMATION PRECISE—VIOLATION OF TRUST — ORAL EVIDENCE — BEGINNING OF PROOF IN WRITING—HOSTILE WITNESS—CONTRADICTION OF THE SAME, WHEN—NO FORMAL DECLARATION FROM COURT REQUIRED.

A party convicted by a District Court for embezzlement of jewelry appealed on the following grounds :

(a.) *The Information, and, consequently the conviction, was bad for ambiguity and uncertainty, in as much as the jewelry was stated to have been entrusted in virtue of a deposit* OR *trust.*

(b.) *The embezzlement, if any, was not of the jewelry itself, but of the money, the proceeds of the disposal thereof.*

(c.) *The Magistrate should not have allowed the contract of deposit or trust to be established by oral proof.*

(d.) *The Magistrate wrongly allowed one of the witnesses for the prosecution to be contradicted by other witnesses, called to that effect by the prosecution, before he had declared that that witness was an "hostile" witness.*

By the Court :

With regard to :

(a.) *It is true that deposit and trust are two different contracts, but there could not be any ambiguity here, in as much as the information stated that the Article had been entrusted for the purpose of being pledged for a sum of Rs.* 300, *which was to be handed over to complainant.*

With regard to (b.)

(b.) *The Court is satisfied from the evidence that the accused was to pledge the jewelry and that, in violation of the trust, he sold the same and pocketed the proceeds.*

With regard to :

(c.) *There were two letters emanating from the accused rendering likely the facts alleged ; there was, consequently, a beginning of proof in writing, and the Magistrate rightly allowed the proof to be completed by oral evidence.*

With regard to :

(d.) *There is no doubt from the evidence, that the witness was hostile to the prosecution ; there is nothing in the law or in the practice of the Court which requires that the Magistrate should give a formal decision to the effect that the witness is hostile, before he can allow the witness to be contradicted.*

Appeal dismissed with costs.

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NARAINASAMY,—Appellant.

and

THE QUEEN,—Respondent.

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Before

His Honor Sir E. J. Leclézio, Kt.,—Chief Judge.

and

His Honor John Rouillard,—Puisne Judge.

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V. K/Vern, —Counsel for the Appellant.

A. St. George,—Attorney for the same.

The Hon. L. Rouillard, Substitute Procureur General, — Appears for the Respondent.

J. Guibert. Crown Attorney, — Attorney for the same.

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Record No. 554.

30*th. August* 1888.

JUDGMENT

Delivered by His Honor The Chief Judge.

In this case, the appellant was prosecuted before the District Court of Plaines Wilhems for having embezzled certain jewellery to wit: a necklace, to the prejudice of one Coomarasamy " which said necklace had " theretofore been delivered to the said Naray- " nasamy merely in pursuance of a deposit " or trust with the condition that the same " should be returned or employed for a " special purpose to wit, for the purpose of " being pledged &a..." The Magistrate found him guilty and sentenced him to six months imprisonment.

An appeal has been lodged against the decision of the Magistrate and several grounds have been urged before us. The first ground was that if the accused was guilty, he was only guilty of an embezzlement of money ; and the third ground was that the conviction was uncertain, because in the Information he was accused of having embezzled a necklace which he held in pursuance of a deposit or trust, and that a deposit was not the same as a trust ; and therefore the information being ambiguous and uncertain, the conviction being in conformity with the information could not stand. I propose to examine those two grounds at the same time, because there is a great connexity between them.

With regard to the ground that the information was ambiguous, a good deal of argument was laid before the Court. We were at first told by the learned Substitute Procureur General that deposit and trust were exactly the same thing ; that the word " trust " was merely an addition to the word " deposit ", but that in reality it meant the same thing. We have carefully looked at the terms of the Penal Code, and have compared the French text with the English text, and there is no doubt in our minds—and I believe it has already been decided by the Court in preceding cases; (for instance the point is examined in the case of Painter —Piston's Reports 1879 p. 2) that the word " *trust* " was the translation of the word " mandat " in the French text ; deposit and trust are therefore two distinct contracts the violation of which may constitute different grounds of the offence of embezzlement ; an embezzlement may be committed by a breach

of the contract of deposit or by a breach of the contract of trust; but at the same time on reading the information we have come to the conclusion that there could not be any ambiguity in the mind of the person accused, because the information explains the nature of the contract and of the breach, as follows: "in pursuance of a deposit or "trust, with the condition that the same "should be returned or employed for a "special purpose" and the purpose is given, for the purpose of being pledged by the said Narainsamy for the sum of Rs. 300 which said sum was to be handed over the said Coomarasamy by the said Narainsamy.

Now, it is clear from the words which have been added to the printed form of that information that they define in a very clear and precise manner what was the nature of the contract that was entered into between the parties, and there can be no doubt at all that the contract which is alleged in the information is a contract of trust or "mandat" and not a contract of deposit or depot. Therefore, we do not think there could have possibly been any ambiguity or uncertainty in the information and that the Magistrate having convicted the accused in the terms of the information, this conviction should not be quashed on that ground.

We must, therefore, set aside the third objection. With regard to the first objection, which is a second branch, I may say, of the argument on the third ground of appeal, it is stated that the accused could not be found guilty of having embezzled the jewellery itself, as charged on the information, but he could only have been found guilty of having embezzled the money, which he received as a consequence of the transaction which took place between him and a man named Mardy, who figures as a witness in the case. It would appear that when Narainsamy had got possession of that necklace, which was of same value, being composed of 62 five franc pieces in gold and a gold armlet, that instead of pledging it, as the contract between him and Coomarasamy was, in order to obtain a certain sum of money to be handed over to Coomarasamy, he sold it to Mardy. There is a bill of sale which is in the record, and which shows that at a certain date, which is mentioned, instead of making a pledge of that necklace, he made a bill of sale, and there is no reservation at all in that bill of sale, although Mardy who was called as a witness, stated that he understood it to be a mere pledge and that he was ready to give back the jewellery if the money which he gave was returned to him, and, besides, it would appear that the amount for which that necklace was sold was a much higher sum than that which Coomarasamy had asked the accused to obtain upon the pledge of the necklace. It is therefore a question of fact more than of law, which had then to be decided—It would appear that the Magistrate was satisfied that the contract between the accused and Coomarasamy was that he should pledge the jewellery for a certain amount, on that he should sell it for a much higher amount. There was neither necklace nor money handed over by the accused to Coomarasamy. After having received the money from Mardy, instead of going back to where Coomaraaamy lived at Rivière du Rempart, he concealed himself in some distant part of the District of Black River, where he was found. We think therefore that this objection, with regard to the embezzlement of the money, cannot stand in presence of the evidence laid before the Magistrate, which is to the effect that the accused violated the contract of trust entered into by him, in this sense, that he neither returned the necklace entrusted to him, nor did he give the money which he obtained by means of the sale of the necklace.

There is another point which was argued:

It was said that in presence of the denial of the contract, the Magistrate should have asked for the written proof of the contract. There is no doubt that, during a certain time, the Supreme Court here did hold that it was not necessary to have a complete proof by writing, or even a beginning of proof by writing, of a contract of deposit or mandate in order to prosecute a party for embezzlement, but that jurisprudence of the Court has been set aside not very long ago, and it is now considered that we should follow the same jurisprudence in regard to those matters as the Courts in France follow, that is to say, that before a man can be prosecuted for embezzlement, for breach of a contract of trust or deposit, for instance, there should be at all events, a beginning of proof by writing to allow the Magistrate to go into the oral evidence. Now, we have carefully examined the record in this case, and we see that the first thing which the Magistrate did, when there was a plea of not guilty, that is to say a denial of the contract, was to call for a beginning of proof by writing. There were two letters emanating from the accused written by him to the complainant which show clearly an admission on his part, which, if not complete in itself, was certainly a "commencement de preuve par écrit," which allowed the Magistrate to enter into the oral evidence. It was said that these letters did not emanate from the accused, but witnesses were called in order to prove his writing, witnesses who themselves had seen him with those letters, and who took them to Coomarasamy. It would appear that the Magistrate believed these witnesses, since after having had the beginning of proof by writing proved and only then, he allowed the oral evidence in order to complete the proof. He does not state it in so many words in his judgment, but it appears from the order of proof that exists in the Record, that that must have been his idea, and that he acted therefore in conformity with the new jurisprudence of the Court in regard to these questions of embezzlement.

We think, therefore, that here there was a beginning of proof by writing. When we examine the evidence on that question we think the Magistrate was right. He had plenty of evidence to decide that those letters emanated from the accused, and he was therefore perfectly entitled to allow oral evidence to complete the proof of the contract entered into between the parties.

Now, certainly, there is conflicting evidence in this case, as in many other cases, but we have always held that it is for the Magistrate who hears the evidence, when he hears considerable evidence on both sides, to discriminate which of the two he believes; and as in this case the weight of the evidence appears to be in favour of the prosecution, he was perfectly entitled to come to the conclusion that there had been that sort of contract which was alleged in the information; that is to say, that Coomarasamy had entrusted that jewellery for the purpose of being pledged by the accused for a certain amount which amount was to be delivered to him. Now, if he has acted in violation of that trust as the Magistrate was entitled to hold in presence of the evidence, we consider that he was guilty of the offence of embezzlement. There is also another point to which our attention was called. It is this, that incompetent evidence had been admitted. First, as to the admission of oral evidence. I have just settled that point by ruling that the Magistrate proceeded in accordance with the order to be followed in such matters in conformity with the new jurisprudence of the Court. The second incompetent evidence said to have been admitted was that of the plea which was made by the accused before the District Court of Rivière du Rempart where the

prosecution was at first begun, and where after hearing a certain number of witnesses the Magistrate declared that he had no jurisdiction. The point is that the plea which was taken in the Record, which appears to have been a plea of guilty, whether rightly understood by the interpreter or not, the Magistrate of Plaines Wilhems was not entitled to take into consideration, because it was a plea given before an incompetent Court.

We will not examine the question as to whether that was good evidence or not, because it would appear that the Magistrate of Plaines Wilhems who at first reserved that point, finally rejected that plea and said he would not take it into consideration; so, after all, it was not admitted by him as evidence.

It was stated also that Mardy, who had been called by the prosecution, was allowed to be contradicted by other witnesses for the prosecution, before the Magistrate had declared him to be an hostile witness. It is a well known principle of the law of evidence now, that when you call a witness, you are not entitled to contradict his evidence except in case the witness shall in the opinion of the judge prove adverse or hostile; and in this case there is no doubt, I may say, from the evidence of that man Mardy, that he was hostile to the prosecution. Whether he thought that he had an interest in the case or not, not having had the witness before us we cannot express any opinion as to his attitude; but there is no doubt from his evidence that he was hostile. For instance, upon that question of the bill of sale, there was a question of date, and some of the witnesses stated that when the bill of sale was shown to them by Mardy, when he was living on an Estate in the District of Plaines Wilhems, it bore the date of the 4th. May, that is the date which is alleged in the information, as the date at which the offence took plaee. The bill of sale was shown to a Sergeant of Police, a man named St. Flour, among other witnesses, and that man is very positive, he took a note of it, he returned the bill of sale after seeing it but he took a note, and he is positive as to the date which that bill of sale bore on its face, as being the 4th. May. Now, the bill of sale which Mardy afterwards produced before the Court bore the date of the 4th. February. It is true that some of the witnesses declared that the biil of sale which they had seen from the very beginning bore that date. The Magistrate evidently thought that the witnesses of the prosecution on that question of date were more trustworthy than the witnesses on the other side, and he allowed that evidence to be ushered in, and he appears to have adopted the theory that the bill of sale at first bore the date of the 4th. May and that in reality the one before the Court was a new bill of sale although for the same purpose. Now, can it be said that because the Magistrate has not stated in so many words "I decide that "Marday is hostile to the prosecution and "I therefore allow evidence to be ushered in "in order to contradict him," that the evidence of the other witnesses has become incompetent? I believe there is nothing in the law or in the practice even of this Court, which requires that the Court should give a formal decision to the effect that the witness proves adverse or hostile, and if the Court is satisfied that a witness who is called by a party proves hostile to that party after having been examined and cross-examined, the Court certainly may in its discretion allow other witnesses to be called in order to contradict that witness. That is what the Magistrate has done in this case—he has not used the sacremental words that the witness proves hostile, but after having heard him and although the other side had objected to the hearing of the witnesses called to contradict Mardy, he overruled that objection and allowed those

witnesses to be heard. We consider that that is a sufficient manifestation on the part of the Magistrate that he considered that Mardy was hostile, although called by the prosecution, and that the evidence of the witnesses called to contradict the evidence of Mardy had become competent.

The last objection was with regard to the difference between the date alleged in the information as that of the commission of the offence and that figuring in the Bill of sale produced by Mardy before the Court. I have already said something on that point. There is no doubt that the Magistrate here preferred to believe the witnesses who stated that the date of the bill of sale was the 4th. May, and that the new bill of sale which was produced was antedated by the party who produced it.

Those are the only objections which were laid before us, and after having carefully examined them, and having read the record which is before the Court, we think that the Magistrate has come to a sound conclusion and that the conviction must be maintained.

The appeal is therefore dismissed with costs.

SUPREME COURT

CHARTERPARTY—DAMAGES—LOADING OF SHIP —OPINION OF SURVEYOR — EVIDENCE OF MASTER— FRESH WATER— SALT WATER — STATUTE 39 AND 40 VICT: C. 80 S. 25— LOADING LINES—CASE DISMISSED.

Plaintiff claimed damages for an alleged breach of a charterparty made at Calcutta, under which the plaintiff was to pay a lump sum for the whole ship and the vessel was to receive a full and complete cargo of grains and salpetre.

Plaintiff contended that Defendant refused to receive on board a certain quantity of goods which the ship might have safely carried over and above the goods already stowed, her tackle, provisions etc. and produced a Report to that effect signed by a Surveyor of Calcutta.

The defendant pleaded that the ship was fully loaded in conformity with the provisions of 39 and 40 Vict. Chap. 80, Section 25 et alia — the load lines being three inches and a half under fresh water in the river.

Held by the Court:

1o. *That if a charterer pays a gross sum for the whole vessel, the payment is no more affected by the quantity actually carried than the hire of a house would be by the use or non use made of it.*

2o. *That both under the statute 39 and 40 Vict. Chap. 80, Sect. 25 et alia, and under the charterparty, the test must be how far the ship shall be loaded in salt water.*

3o. *That the evidence in this case showed that the ship actually carried as much as it could safely do.*

4o. *That a mere Report of a survey taken "ante litem motam" which is unsworn to, cannot be considered as evidence on a disputed question of fact.*

5o. *That if the charterparty requires the hirer of the ship to fill the ship, or load her with a full cargo or to her utmost capacity, or if any such language is used, he will not be obliged to put in, and if he offers, the owner or master will not be obliged to receive more cargo than she can safely carry, although all the space is not filled.*

6o. *That the opinion of the Master on this point is entitled to great weight, and it has been held that it is controlable only by decisive evidence of a mistake on his part.*

Case dismissed, with costs.

HAJEE HAROON SIDICK,—Plaintiff.

and

PETERSON,—Defendant.

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Before

His Honor Sir E. J. Leclézio Kt.,—Chief Judge.

and

His Honor A. Mure,—Puisne Judge.

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G. Guibert,—Counsel for Plaintiff.

F. Robert,—Attorney for the same.

L. Chastellier,—Counsel for Defendant.

E. Duvivier,—Attorney for the same.

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Record No. 24,553.

6th. September 1888.

JUDGMENT

Delivered by Mr. Justice Mure.

In this action, a claim is made by the plaintiff as charterer of the ship *British Princess* for Rs. 1668.50, being various items of damage for alleged breach of a charter-party made in Calcutta between the plaintiff's firm there and Mc Khight Anderson & Co., the owner's agents. Under this charter of affreightment, the agreement between the contracting parties was that the plaintiff should pay a lump sum for the whole ship of Rs. 32,000 and the vessel was bound to receive a full and complete cargo of rice and other grains and of saltpetre (but of the latter substance not more than 300 tons) which cargo the charterer (the plaintiff) bound himself to ship not exceeding what the vessel could reasonably stow, over and above her tackle, apparel, provisions and furniture. It was further provided that the vessel was to be loaded up to the salt water mark, if not full.

These being the provisions of the charter, if a charterer pays a gross sum for the whole vessel, it seems to follow that the payment is no more affected by the quantity actually carried than the hire of a house would be by the use or non use made of it. No doubt this makes the actual quantity which the ship is to carry of great importance to the charterer, for upon that, it may depend that the contract will or will not be profitable for him.

Next, we have to notice that this was a British ship, the contract was made and was fulfilled in different places but both subject to the Merchant Shipping Acts. Under the Merchant Shipping Amendment acts 1876 (39 and 40 Vict. Chap. 80 Sect. 25 &...) every British ship, except certain small vessels and yachts, must be marked on each side with deck lines and with load lines, the latter indicating the maximum load in salt water. By Section 26, the owner of every British ship "shall mark upon each "of her sides amidships or as near thereto "as is practicable.....a circular disc twelve "inches in diameter with a horizontal line "eighteen inches in length drawn throught "its centre. The centre of the disk shall "indicate the maximum load line in salt "water to which the owner intends to load "the ship." A freeboard, as it may be called, is also fixed under the statute; it is the space between the centre of the disc and the upper deck line. The Board of trade, it appears, is in use to issue to vessels certificates of this Free Board by which it was fixed in the case of the *British Princess* at 4 feet 10 inches.

One of the questions raised between the parties was as to the meaning and effect of the clauses of the statute and of the charter party when a ship is loaded in fresh water. The contention of the defendant was that the horizontal line through the disk was a fixed point independent of the fact that the ship is in salt or fresh water. As the ship was in the present instance loaded in fresh water, and the difference of buoyancy of salt water making the *British Princess* sink 8½ inches deeper in fresh water than in

salt water, this contention becomes important in the present case. But we are of opinion that both under the statute and under the terms of the charterparty in the present instance, the test must be how far the ship shall be loaded in salt water and that the free space above the water must be reckoned by the buoyancy of the ship itself in salt water. We have to add that the defendant, the captain of the *British Princess*, was of that opinion, when he was loading his ship at Calcutta, for his evidence was to the effect that the horizontal line in the centre of the disk was from 3 to 3½ inches below the surface of the fresh water at Gardenreach where the ship was loaded. In short, the statute distinctly contemplates that the centre of the disk is to indicate the maximum load line in salt water and the convention of the parties was that if not full, the vessel was to be loaded down to her salt water mark, and we are of opinion that this must be estimated by the depth to which the vessel sinks in salt water.

In conformity with the provisions of the charter, the ship took nearly 2000 tons of grain, chiefly rice, and some saltpetre. The plaintiff, the charterer, had a representative on board, he appeared contended with the manner in which the ship had been loaded and, according to the evidence of the Captain and Mate of the vessel, expressed himself so to them. But the captain thought that he could safely carry something more and he took 400 additional bags of oats as part of the cargo. We must say that the defendant seemed desirous to fulfil his contract to the letter. But this very fact seems to have roused the suspicion of the charterer who sent a surveyor Mc Kellar on board. His report is the foundation of the present action. He reported that the centre of the horizontal bar was 4 feet 9⅞ inches from the top of the disk bar, that the centre of disk is one inch under water on the starboard side and at the water's edge on the port side making a mean of half an inch below water. He was further of opinion that the ship would rise nearly an inch when her moorings were cast off and taken into the ship, and that it should rise at least four inches when in sea water, and concluded that she could load three and a half inches deeper than she then was. In other words, according to his calculation she could have taken 76½ tons more of cargo on board, and in conformity therewith, the plaintiff sent that quantity of goods along the ship to be taken on board which the defendant refused.

This report is dated 9th. June and the loading of the ship had been concluded the day previous.

The defendant immediately employed two other surveyors Messrs. Allison and Morron to survey the ship and report on the disputed question; they found that she had a mean draft of 20 feet 7½ inches, that when the moorings were taken on board that would put the ship down one inch more, that the present mean free board was 4 feet 7 inches, being 3½ inches more than her salt water draft allowed. They were of opinion that the ship was quite deep enough, and Morron says that she had 50 tons more cargo than the agreement required her to take. On receiving these reports, the ship took in its moorings and set sail from Calcutta. On reaching Sangor roads on the 12th. June, where the ship was anchored in salt water, the mate took the draft of the ship and found it to be a mean of 20 feet 4¾ inches.

After 54 days of passage between Calcutta and Port Louis the ship arrived off our harbour, and was immediately surveyed on behalf of the Charterer by Messrs. Cowin and Perrin, surveyors of this place. They reported that the mean draft was twenty feet, and that the centre of the bar of the disk was five inches out of the water and

that the vacant space in the hold could contain a great many tons of cargo more.

The case then came into Court and we had a considerable proof laid before us.

The defendant was examined by the plaintiff on his personal answers, and Messrs. Cowin and Perrin were also adduced by him as witnesses. On the other hand, we had before us as witnesses for the defence, not only the captain, but also Messrs. Ellis and Macdonald, surveyors of this place, the mate, carpenter and sailmaker of the ship, but also several captains of other vessels. The difference of draft of 8 inches between Calcutta and Port Louis is explained satisfactorily by the defendant and his witnesses. According to them, the rise of the ship from river to salt water accounts for... ... ... 3¾ inches
then the consumption of provisions and water lightened the ship ... ... 1½ ,,
while the loss in weight of grain and saltpetre from evaporation was 2½ per cent, equal to 43 tons or a rise of ... ... 3¾ ,,
8½ inches.

A strong effort was made by the plaintiff to destroy the effect of this evidence, or rather to minimise the extent to which the draft of the ship was lessened by these facts. But the Court is clearly of opinion that the defendant has proved satisfactorily that the change from fresh to salt water, the use of stores and the natural evaporation of the cargo account for eight inches at least of the difference of draft. It was contended for the plaintiff that there must be a mistake in taking the draft of the ship at Calcutta. This applies to the measurements of his own surveyor as well as of all the other parties who took the draft of the ship, for all the measurements taken of the draft differ only by half an inch and that is explained by the ripple on the water which deceives the eye. It was further proved that the whole measurement of the ship from the keel to the upper deck line amounted to twenty five feet two and a half inches, and, according to Mc Kellan's report the mean draft of the ship was 20 feet 8 inches, while the distance from the centre of the disk to the upper disk line, he says, was 4 feet 9⅞ inches or, say, 4 feet 10 inches, but that would make the side of the ship to measure 25 feet 6 inches and he thus gives to the ship 3½ inches of space more than existed in it.

But the correctness of this report was not sworn to, and the plaintiff has failed by any evidence whatever to prove the alleged state of matters, which existed at Calcutta; for mere reports of surveys taken "ante litem motam", which are unsworn to, cannot be considered as evidence on a disputed question of fact. The able counsel for the plaintiff was driven to the argument that the Court should, in deciding the case, proceed upon probabilities. I do not deny that the Court may arrive at a conclusion from presumptions of fact, but when we have direct and opposing testimony from a large body of independent witnesses who depose to facts which negative these presumptions, it is impossible to give any effect to them. The witnesses for the defence leave no doubt in our mind that the mistake was made by the plaintiffs' surveyor in estimating the depth of fresh water which was above the centre of the disk at Calcutta. The Captain has been able to swear to the original reports of the surveyors on his side, and he and the mate and carpenter all swear that the centre of the disk was 3½ inches under the water and that the actual free board was 4 feet 6½ inches. In this, we are confirmed by other witnesses, who have seen the ship in Port Louis harbour and who depose to facts confirmatory of the direct evidence which we otherwise have. Particularly, the evidence of Captain Ellis is very clear and

he shows that Mr. Kellar's report is contradicted by the facts of the case. Even the plaintiffs' witnesses, Messrs. Cowin and Perrin, are not unfavourable to the defendant and admit there is a difference of 2½ inches between theirs and Mr. Kellars measurements. The plaintiff, in short, has really no satisfactory evidence to support the allegation of a breach of the conventions of the charterparty. In concluding this judgment, it is important to notice that the knowledge and experience of the captain of a vessel ought to have great weight in such questions in every Court of Justice. For instance, in the present case, Mr. Kellar, without any experience of the *British Princess*, reports that it would require seventeen tons of cargo to depress the ship one inch, and he calculates on that footing the quantity of additional cargo which the ship might take. Messrs. Cowin and Perrin on the other hand testify that the experience of the captain of a ship will tell him how much cargo may be put on board and how many tons it will take to depress the ship by one inch.

In point of fact the *British Princess*, in the experience of the captain and crew, was depressed by one inch for every twelve tons of additional cargo loaded on the ship about that part of it where the disk appears. We fully concur with and agree in the opinion expressed by Parsons in his law of shipping, Volume 1st. page 291, where it is stated. "If the charterparty requires the hirer to "fill the ship, or load her with a full cargo "or to her utmost capacity, or if any such "language is used, he will not be allowed to "put in, and if he offers, the owner or "master will not be bound to receive, more "cargo than she can safely carry, although "all the space is not filled. This question "is generally one to be determined by "experts on all the facts of the case—and "the opinion of the master on this point is "entitled to great weight, and it has been "held that it is controlable only by decisive "evidence of a mistake on his part."

For the reasons we have already given, we are of opinion that the defendant has committed no mistake, but judged rightly the capacity of his vessel, and there being no breach of the charterparty proved, we dismiss this case with costs against the plaintiff.

SUPREME COURT

APPEAL FROM DECISION OF DISTRICT COURT—AUCTIONEER — RIGHT TO SUE IN HIS OWN NAME— COMPENSATION— AUCTIONEER DELEGATED — ARTICLE 625 C. C. P.— ORDINANCE 3 OF 1838 SECTION 10—NO COMPENSATION BETWEEN PURCHASER AND VENDOR AT PUBLIC AUCTION—APPEAL DISMISSED—COSTS.

An auctioneer sued a party before a District Court for the recovery of the purchase price of a certain stock in trade, and judgment having gone against the defendant, the latter appealed to the Supreme Court, on the following grounds :

(a.) *An auctioneer is not entitled to sue for the payment of the sale price of the articles sold by him.*

(b.) *Admitting that such a right does exist, the proper plaintiff should be the auctioneer who actually sold and not the auctioneer merely entrusted with the sale.*

(c.) *That, at all events, the auctioneer should sue as agent "ad litem" for the owner of the goods, and the appellant would then to be entitled to set off against such owner a liquid and exigible claim which he had against such owner.*

By the Court, with regard to (a *and* c).

1o. *The auctioneer has the right to claim in his own name the sale price from the purchasers in order to distribute the same to*

the interested parties after having deducted therefrom his commission and other charges.

2o. *By Ordinance* 3 *of* 1838, *Section* 10, *auctioneers must keep the proceeds of the sale in their own hands for three days, evidently for the purpose of allowing the creditors of the vendors to lodge an attachment.*

3o. *Such an enactment taken together with Article* 625 *C. C. P. excludes the idea that the purchaser having a claim against the vendor can invoke compensation.*

With regard to (*b.*)

4o. *The auctioneer entrusted with the sale, is the auctioneer answerable to the vendor, not the auctioneer whom the first delegates to make the sale. The first auctioneer, therefore, properly entered the action in his own name.*

Appeal dismissed, with costs.

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SYLVAIN,—Appellant.

and

TOURRETTE,—Respondent.

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Before

His Honor Sir E. J. Leclézio Kt.,—Chief Judge.

and

The Hon. A. Mure,—Puisne Judge.

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H. Galéa,—Counsel for Appellant.

S. Piarroux,—Attorney for the same.

A. Hugues,—Counsel for Respondent.

E. Huteau,—Attorney for the same.

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Record No. 907.

6*th. September* 1888.

This is an appeal from a judgment of the District Court of Moka by which the appellant was condemned to pay the Respondent, a Sworn Auctioneer, the sum of Rs. 625, being the sale price of the stock in trade of Fanfan & Co., shopkeepers at Moka, awarded to the appellant at a public sale which was made by Mr. Robert a Sworn Auctioneer whom the Respondent had delegated to that effect.

The points taken before the Magistrate were 1o. that an auctioneer was not entitled to sue for the payment of the sale price of the articles sold by him, 2o. that admitting such a right to exist, the proper Plaintiff should have been Mr. Robert who made the sale by auction and not Mr. Tourrette, 3o. that if Mr. Tourrette had the right to sue, he could only bring the action as agent "ad litem" of Fanfan & Co. and that the appellant was entitled to set off against Fanfan & Co. a liquid and exigible claim which he had against them.

The Magistrate overruled these three objections and gave judgment in favour of the Respondent.

The same objections were taken on appeal before us and it was strongly contended on behalf of the appellant that the result of the jurisprudence of the Court of Cassation in a case which appears to be in point (S. 1861.1.15) would be to create in favour of the creditors of the auctioneer the right of lodging attachments in the hands of the purchaser, a consequence which Article 625 of the Code of Civil Procedure did not contemplate when it enacted that "les Com-"missaires Priseurs et huissiers seront "personnellement responsables du prix des "adjudications."

The Court of Cassation, in the "arret" referred to, held that it results from the terms of Article 625 of the Code of Civil Procedure and from the General Rules of their institution, that auctioneers and ushers are personally responsible for the price of the awards made by them and it adds "que la responsabilité qui pèse sur l'officier

" publique et qui fait de lui un débiteur " personnel du vendeur ou de ses créanciers " et un créancier direct des acquéreurs, " écarte l'idée que celui qui achète une partie " du mobilier puisse opposer la compensation " entre le prix de son acquisition et ce " que pouvait lui devoir antérieurement le " vendeur."

It is clear that by using the words " créan- " cier direct des acquéreurs " the Court of Cassation has not meant that the auctioneer had become the owner of the claim; such an idea would clash with the words which precede, in which it is stated that he has become the personal debtor of the vendor or of the vendors' creditors.

The words simply mean that the auctioneer has the right to claim the sale price directly from the purchaser in order to distribute it to the interested parties after having deducted therefrom his commission and other charges. The question of compensation is also examined by an "arret" of the Court of Nancy S. 1872 2. 40. in the case of an usher who had made a sale of moveables seized. " Comme acquéreur d'une partie des meubles " vendus, C. est devenu le débiteur non pas " de H. (the seized party) mais de l'Huissier " chargé de recouvrer le prix de vente et " réputé le dépositaire légal et responsable " de ce prix, aux termes de l'Article 625 C. " Proc., que dès lors l'Article 1240 C. Civil " ne pourrait recevoir ici son application, " que dans le système contraire il suffirait au " saisissant d'acheter tous les meubles mis " en vente pour écarter tous les autres " créanciers du saisi et l'affranchir, au " mépris de leurs droits, de l'obligation de " concourir avec eux à une distribution par " contribution."

The principle must be the same in matters of sale by an auctioneer. In the present case, an attachment was lodged in the hands of the auctioneer by a creditor of Fanfan & Co., One of our local Ordinances on auctioneers (No. 3 of 1838, Article 10) enacts that auctioneers shall keep the proceeds of the sale for three days before handing them over to the vendor, evidently for the purpose of allowing the vendor's creditors to lodge attachments in his hands. Such an enactment taken together with Article 625 of the Code of Civil Procedure would exclude the idea that a purchaser having a claim against the vendor could invoke compensation, and we have no hesitation in adopting the jurisprudence of the French Courts in this matter and to hold that the Magistrate was right when he overruled the first and third objections raised by the appellant.

This theory is also confirmed by the consideration that in sales by auction the price is payable in ready money or for cash, unless arrangements are made with the auctioneer previous to the sale ; which implies that after the award is made, the delivery of the article so awarded and the payment of the price shall take place at one and the same moment, a system which entirely excludes the principle of compensation between the claim of a purchaser and the debt due to him by the owner of the goods sold.

With regard to the second objection, namely, that the sale was made by auctioneer Robert and that, on that account, auctioneer Tourrette had no right to sue, we think that it cannot be sustained in presence of the facts of the case. Auctioneer Tourrette had been entrusted by Fanfan & Co. with the sale, he was the auctioneer responsible towards them, but being unable to go to Moka on the day appointed for the sale, he delegated auctioneer Robert to make the sale.

This appears to have been known to the appellant, for in a notice served at his request on the Respondent, previous to the entry of the action, and in which he tenders to him his Commission on the sale price, he calls the Respondent the auctioneer in charge of the sale.

The Magistrate was, therefore, right in holding that Tourrette was entitled to sue the purchaser under the circumstances, and we must, therefore, dismiss this appeal with costs.

SUPREME COURT

APPEAL FROM DECISION OF DISTRICT COURT—VERBAL LEASE — OCCUPATION — EVIDENCE CONFUSED AND UNSATISFACTORY — EXAMINATION ON PERSONAL ANSWERS—DISMISSAL.

In this case, which is an appeal from a District Magistrate's decision, it was urged that:

(a.) *There was confusion in the evidence, which sometimes represented the defendant (appellant) as a tenant under verbal lease, and, at other times, as an unlawful occupier.*

(b.) *No proper case of occupation had been made out.*

(c.) *The Magistrate should not have allowed the defendant to be examined on his personal answers before the plaintiff had given up that part of the claim grounded on a verbal lease.*

By the Court:

(a.) *Confusion of evidence must, at times, arise in cases of this nature based, at the outset, upon two different and distinct grounds—the Matter is foreseen in Article* 6 *of Ordinance* 15 *of* 1881.

(b.) *The occupation had been made out.*

(c.) *The examination on personal answers, as as above, was competent.*

Appeal dismissed, with costs.

COMRASAMY,—Appellant.

and

URCETTE,—Respondent.

Before

His Honor Sir E. J. LECLÉZIO, KT.,—Chief Judge.

and

His Honor F. C. WILLIAMS,—Puisne Judge

W. NEWTON,—Counsel for Appellant.
H. BERTIN,—Attorney for the same.

F. MATHEWS,—Counsel for Respondent.
A. ROHAN,—Attorney for the same.

No. 901.

7th. September 1888.

This is an appeal from a jugdment of the Senior District Magistrate of Port Louis condemning the appellant to pay to the Respondent the sum of Rs 360 for the use and occupation of premises belonging to her during six months, from 1st. April to 30th. September 1887. The action was entered against the appellant, 1o. on the ground that he was a tenant under a verbal lease, and 2o. in case of denial of the lease, on the ground of occupation of the premises by him giving the right to claim an indemnity from him. When the appellant was examined in the Court below on his personal answers, he denied the existence of the contract of verbal lease, and the counsel for the Respondent then informed the Court that he would prove the use and occupation as alleged in the second part of the Plaint. Witnesses were heard, and the Magistrate gave judgment for the Plaintiff, now Respondent, in the amount claimed.

In the notice of appeal there are several grounds, but the argument of the counsel for the appellant bore principally upon the points, 1o. that there was confusion of evidence as to the two grounds of action and 2o. that there was no proper case of occupation made out. Some allusion was also made to the fact that the appellant had been examined on "faits et articles", in

spite of the objection of his counsel, before the Plainliff had elected to go on the second ground of the plaint, but we think that the Magistrate was right in allowing the Plaintiff to examine the defendant on his personal answers in order to try to obtain an admission or "aveu" from him of the existence of the alleged contract of lease. This being denied, and the plaintiff having declared that she would proceed on the second ground of the action, namely, on the alleged use and occupation of her premises by the defendant, oral evidence became competent, and although some of the witnesses spoke of the defendant as a tenant under a verbal lease, instead of calling him an occupier, we do not think that this affords sufficient ground for our considering the judgment of the Magistrate as bad in law, because he clearly stated that he gave judgment against the defendant as occupier. Besides, such confusion should be expected in cases of this nature, based upon two different grounds of action, and the law itself seems to have foreseen it, for we read in Article 6 of Ordinance No. 15 of 1881 :

"In any claim to rent or indemnity for "the occupation of immoveable property, "oral evidence shall, when a lease is denied "and is not completely established by writ- "ing, be admissible to prove or disprove "the occupation and the amount or payment "of the indemnity, and the party suing "shall be entitled to such indemnity although "it may result from the oral evidence "given that the occupation existed under "a lease."

The real issue before the Magistrate was whether the defendant was in occupation of the premises or not. The theory of the defendant is that although he lived on the premises with his concubine, he was there only as a subtenant of his mother-in-law, who is a lodging house keeper, and in whose name the sign board was. There is however ample evidence that the defendant made certain admissions as to his liability for the occupation to the owner, and that he gave receipts, among others, to a subtenant, a chineese shop-keeper, in his own name, as if he was the party responsible as principal tenant or occupier. The only facts which are in favour of the defendant are that since October 1887, it would appear that Chellaye, his mother-in-law, is the party from whom the rent is claimed, and that the sign board was in her name since 1886, but the other evidence in the case is so strong in favour of the Plaintiffs, now Respondent, that we think this is a case in which we should not disturb the judgment of the Court below.

We must, therefore, dismiss the appeal with costs.

SUPREME COURT

APPEAL FROM DECISION OF DISTRICT COURT—CONTRACT OF MARRIAGE—RIGHT OF INHERITANCE—ORDINANCE 34 OF 1852, SECTION 8—PARTIES NOT IN CAUSE—ORDINANCE 19 OF 1868, SECTIONS 52, 53, 85, 86 AND 103—JURISDICTION OF MAGISTRATE—JURISDICTION OF MASTER—DISMISSAL OF APPEAL.

A pretending that he had purchased the right, of B (since dead) in a certain plot of lands sued the other co-owners, before the Master's Court, for the licitation of the same.

Thereupon B's Widow entered an action before a District Court, concluding that she was owner of half of the rights of B, the land having been acquired during the community, that the other half belonged to B's nephew, and that A should be ejected from the land.

Judgment having gone in favour of the widow, A appealed, because :

(a.) *Under Section 8 of Ordinance 34 of 1852, all actions arising out of a contract of marriage or a right of inheritance are not within the jurisdiction of the District Courts.*

(b.) *The nephew, as was stated in Court, was dead and the Magistrate did not order his representatives to be made parties to the suit.*

(c.) *Plaintiff should have entered her action before the Master, and prayed for the nullity of the licitation, under Sections* 52 *and* 53 *of Ordinance* 19 *of* 1868.

By the Court :

With regard to (a).

The woman claimed here in her own right and there was nothing in the action which had to do with the interpretation of a contract of marriage or a disputed question of inheritance.

With regard to (b.)

1o. *There was no proof of the alleged death.*

2o. *The nephew's rights not being put into question by the plaint, he, properly, was not a contradictor in the case.*

3o. *Appellant himself made no motion that the alleged heirs of the nephew should be made parties to the suit.*

With regard to (c).

1o. *Sections* 52 *and* 53 *of Ordinance* 19 *of* 1868, *refer to seizures of Estates by Creditors, and not to licitations.*

2o. *Under Sections* 85 *and* 86 *and section* 103, *it is true, the widow might have moved for the nullity of the licitation, had she been a party thereto ; but she was not.*

3o. *The Master, could not do what the Magistrate did i.e. declare her right of property and eject the present appellant.*

Appeal dismissed with costs.

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SEENARAIN,—Appellant.

and

WIDOW RAMTOHUL AND ORS,—Respondents.

—

Before

His Honor A. MURE,—Puisne Judge.

and

His Honor JOHN ROUILLARD,—Puisne Judge.

—

H. GALÉA,—Counsel for Appellant.
PIARROUX,—Attorney for the same.

Y. JOLLIVET,—Counsel for Respondents.
ST. PERN,—Attorney for the same.

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Record No. 909.

25*th. October* 1888.

JUDGMENT

Delivered by Mr. JUSTICE MURE.

This is an appeal from a decision of the Senior District Magistrate of Port-Louis in a case in which the defendant (appellant) had begun a licitation before the Master with regard to a plot of ground of two acres in extent, at Grand River, in the District of Port Louis. The respondent, who is the Widow of Ramtohul, was not a party to that licitation, she was not called before the Master, but the various individuals who were supposed to be the owners of the property were called. Ramtohul had acquired a one third share of these two acres of land under a notarial deed along with two other Indians. In that licitation, the appellant averred that he was the owner of one third of this plot of land, as having purchased it from a man named Azime Jhumun, who had again, as was alleged, purchased it from Ramtohul. This alleged transaction took place on the 25th. July 1885. Ramtohul died on the 24th. September 1885. Ramtohul's Widow hearing of this licitation, brought

an action in the District Court of Port Louis calling Seenarain, the appellant, to that action and all the others interested in the plot of ground—among others, she cited a man called Ramabotar, the nephew of Ramtohul, who with his widow, but for the supposed sale, was the owner of the whole of this one third of the two acres. The plaint, in that action narrated the sale by authentic deed to Ramtohul and two other Indians of two acres of land, the death of Ramtohul and the pretentions of Seenarain—and it concluded, and it is important to consider the conclusions of this action — that one half of the one third belonging to Ramtohul belonged now to the plaintiff and the other half to Ramabotar, and that Seenarain should be ejected from the possession of the subject.

The Magistrate dealt only with the plaintiff's right and gave decree in her favour, but has not given any decree in regard to the other part of the property. At the discussion before us on the appeal several preliminary points were argued, and very little was said about the merits of this action.

The first point raised by the appellant's counsel was that the District Court was incompetent to try this action, in consequence of the provisions contained in the 8th. section of the Ordinance No. 34 of 1852, the District Courts Civil jurisdiction Ordinance, which excludes all actions arising out of a contract of marriage or a right of inheritance from the jurisdiction of the Magistrates.

In considering this plea, we must take into account that the status of this woman was not denied; she had produced her act of marriage which showed that she was the widow of Ramtohul and her identity was admitted. This subject had been acquired during the marriage and as there was no contract of marriage between the parties, the marriage must have taken place under the system of the community of goods. One half of the property therefore, even during the marriage, belonged to this woman, though her husband remained during the marriage the administrator of that property. Upon his death the right emerged to her own person with power to act by herself, and when she raised an action in the District Court against the other parties to indicate her right to one half of the one third of this estate she was raising an action to vindicate a right of property in her own person, and certainly there was nothing in the action which at all had to do with the interpretation of a contract of marriage or a disputed question of inheritance.

That was the argument of the appellant's counsel, that this was a right which arose out of the contract of marriage and therefore the District Court was incompetent to try the case. The Court cannot sustain that argument, on the grounds I have just stated. This first plea therefore was properly repelled; this woman had produced her act of marriage, her identity was not doubted and the right which she vindicated was the right of property in her own person.

The next point arose out of the position in which the case was placed by Ramabotar, the nephew and the heir of Ramtohul.

The plaint was served upon this person personally as shown by the Usher's return. He did not appear to defend the action, and it is not wonderful that he should not have appeared, as the summons did not contest any right of his, but rather meant to indicate his rights. In the course of the proceedings as his absence was noted, a report arose that the man was dead and this was mentioned in Court by one of the counsel engaged, but no step was taken in consequence of that report, the verification of the death was not made and it was not shown that the man was dead, and as Ramabotar was not a proper contradictor in the case, the case went on, the plaintiff restricting her claims to a vindication of her own right, and the judge so

dealing with the case. Section 51 of the District Court Rules distinctly states that a suit shall not abate by the death of any party although it is a general rule that all parties in a case shall be made parties to it. But here there was no stay of proceedings asked for, and no suggestion was made that the heirs of Ramabotar should be made parties to case. As I have said, he was not a proper contradictor, and the Magistrate did not deal with his right in deciding the matter, he simply determined the rights of the plaintiff. In these circumstances, we do not think that the proceedings were nullified by any thing that took place before the Magistrate.

In the first place, there is no certain proof of the death of this man and there was no reason for the Magistrate to stop proceedings in consequence of anything that took place. Next, it was for the appellant himself to move for a stay of process and for a suggestion on the Record, if he wished the proceedings to be above all doubt; and not having done so, we think that on appeal that supposed defect cannot be pleaded to his advantage.

The next point that is raised is of a different nature; it is that the plaintiff should have entered her action before the Master, her remedy, it is said, being to appeal to the Master for a nullity of the proceedings. It will be remembered that this woman was not a party to the licitation, she claimed to vindicate her right of property in her own person and she also asked ejectment against the defendants.

The appellant's counsel in this part of his argument referred to the 52th. and 53rd. sections of the Judicial sales Ordinance No. 19 of 1868. Those two clauses of that Ordinance are under the Chapter on the seizure of estates by creditors, they give certain rights to creditors and to parties concerned with regard to irregularities which have preceded the *Cahier des charges* and those which have succeeded it, and, then, the 63rd. section gives a right to any party to move for the distribution of the whole or any part of the subject which has been seized. I must say that I think this part of the Judicial sales Ordinance does not apply to the present case at all.

The case was one of licitation, but these two sections find a place under the chapter on seizures of estates. Under the chapter on Licitation, by the 103rd. section, it is provided that any defendant in the licitation or any judgment or inscribed creditor may have the remedies which are provided under the 85th. and 85th. sections of the Judicial sales Ordinance, and undoubtedly under the 85th. section, a demand in nullity of the proceedings may be made. But the question arises, was that remedy open to the party? It is given to a defendant in a licitation, or to a judgment or inscribed creditor, and this plaintiff was not in the position contemplated by that clause of the Ordinance at all; she was not a defendant or creditor in any sense or a party to the licitation and she therefore could not avail herself of that clause of the Judicial sales Ordinance. Further, the Master could not have given the decree, which the plaintiff sought to obtain from the Magistrate. The Master has no jurisdiction to declare a right of property or give ejectment. His only right would have been to find the proceedings before him to be null. The Court cannot on these grounds sustain this third objection.

The only other matter which I have to notice, refers to the merits of the case, on which little was said by the appellant's counsel, although, of course, he did not give up the appeal on the merits. We have read the papers in the case, and the story of the sale seems to us to be a very improbable one. Ramtohul is alleged to have come into town from his place of residence, to have sent for

Azime Jhumun from the Bazar, where he was working and then to have told him he wanted to sell his property, and without any more, a document was drawn up in a back court attached to his office in the presence of half a dozen of creoles and indians.

That is the story which is given to us ; we have no explanation of the way in which the description of the subject was obtained The boundaries of the property are correctly given in the deed and it is strange that the writer of the deed, was not examined as a witness. I will say this, that the whole story presents a very implorable and unlikely state of affairs, namely, that this man came into town quite suddenly and, without any negociations, simply notified to Azime Jhumun that he needed money and Azime Jhumun paid the money over, and the deed was granted.

That is a story improbable in itself ; but when we come to consider the evidence for the defendant it appears utterly incredible. The man had been ill for twelve months before he died and for three months and a half he was never out of his bed or his room, and we have that in evidence which convinced the Magistrate that it was true evidence. He unhesitatingly declares that his opinion is in favor of the truthfulness of the plaintiff's witnesses, and against that of the appellant and with that judgement we do not intend to interfere.

We therefore dismiss this appeal with costs.

SUPREME COURT

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APPEAL FROM BANKRUPTCY COURT — COMPOSITION—TRUST—UNCONDITIONAL AGREEMENT—ACCOUNT OF MANAGEMENT—SURPLUS—RIGHTS OF ASSIGNORS—APPEAL DISMISSED.

A & Co. having been adjudged Bankrupts, a composition was entered into by them and their creditors, under which the creditors were to receive 50 *o/o.*

B & Co. bound themselves jointly and separately with A & Co. for the said payment and in consideration of the security, A & Co. assigned to B & Co. all their joint and separate estate, effects and property.

The adjudication was then set aside.

Subsequently, a petition was addressed to the Bankruptcy Judge by A & Co., to call upon the managing member of B & Co. for an account of the management of the estate of A & Co.

The Master having rejected the petition, A & Co. appealed.

By the Court :

1o. *A & Co. were only entitled to have proof that their debts had been fully paid by B Co., but not to have an account of the management of their quondam estate.*

2o. *The trust here was not an ordinary trust. The assigment was unconditional—B & Co. were bound to pay the creditors, if A & Co's estate were insufficient. If there was a surplus, that surplus was to belong to B & Co., not to A & Co.*

Appeal dismissed with costs.

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COO VYTHILINGUM, — Appellant.

and

N. SOOPRAYEN,—Respondent.

—

Before

His Honor SIR E. J. LECLÉZIO KT.,—Chief Judge.

His Honor F. C. WILLIAMS,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

H. Galéa,—Counsel for Appellant.
Laurent,—Attorney for the same.

G. Guibert,—Counsel for Respondent.
H. Bertin,—Attorney for the same.

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Record No. 24,535.

31*st. October* 1888.

JUDGMENT

Delivered by His Honor The Chief Judge.

This is an appeal from a decision of the Judge of the Bankruptcy Court upon a petition which was addressed to him by Coo Vythilingum, in order to obtain from N. Souprayen an account of his management as trustee of the estate, in Mauritius, of Coo Vythilingum & Co., which had been assigned to him as managing partner of the firm V. Sooprayen & Co. who had stood as security towards the creditors of Coo Vythilingum and Co. for the payment of 50 o/o of the claims due to the creditors of the bankrupt firm.

The case arose out of a composition deed which was made between the creditors of the bankruptcy estate and Coo Vythilingum. That composition deed was entered into after a deliberation of all the creditors, and it said this : It has been agreed that the bankrupts consent to pay to their creditors 50 cents in a rupee for all the debts in principal and costs, excepting preferential claims which are to be paid in full, and on condition that the two orders of adjudication made against them be annulled by the Court. They bind themselves to pay all privileged claims lawfully incurred, immediately on the annulling of the above orders of adjudication and to pay the 50 per cent in eight equal monthly instalments, the first instalment to be paid after the annulling by the Court of the order of adjudication. V. Sooprayen & Co., bind themselves jointly and separately in the payment of the 50 per cent and privileged costs and preferential claims above stated ; the bankrupts in consideration of the security given by V. Sooprayen & Co. for the payment of the above composition hereby assign to the said V. Souprayen & Co. all their joint and separate estate, effects and property both real and personal situate in Mauritius and in India.

And then the accountant in Bankruptcy intervenes in the composition deed and he also makes an assignment, as the property had already been vested in him ; he makes an assignment to V. Sooprayen & Co., subject to the approval of the Court.

After this composition deed, there was an order of the Court by which the deed of composition is approved and is to be executed according to its form and tenor " the order of adjudication in bankruptcy is " annulled and all the estate and property " of the bankrupts both in Mauritius and " in India and all the books papers &a., are " thereby vested in Nagapoullé Sooprayen, " managing member of the firm V. Soo- " prayen & Co. who is hereby appointed " trustee to carry out the said composition " with full power to recover and realise the " said estate and property."

Such being the case, sometime after that order of the judge in Bankruptcy, a petition was made by Coo Vythilingum to that judge in order to have an account of the management by N. Sooprayen of the estate which was vested in him as managing member of the firm V. Sooprayen & Co. and as trustee of the creditors and of the bankrupts. The Judge in Bankruptcy held that that Coo Vythilingum was not entitled to obtain such account. An appeal has been lodged against that judgment, and the principal argument of the appellant is that the respondent is to be treated as an ordinary agent, and that this is an ordinary case of trust in which an account may be asked for. We have examined with great care the composition deed and the order of the Judge in Bankruptcy which

followed it, and we have come to the conclusion that the assignment which is mentioned in that deed and also in the order of the Judge in Bankruptcy is quite an unconditional assignment. We do not see in it any element which might lead us to consider that what was intended by this deed was a conditional assignment, because we do not see any reservation at all made in it nor in the order of the Judge in Bankruptcy, and we cannot consider that the trust which is mentioned both in the order and in the deed should be interpreted as being what is called in England a resulting trust, that is to say, giving the right to the party who has assigned his estate to the trustee to have the surplus of the estate after the payment of all the debts which were to be paid. The assignment having been made in consideration of the security given *in solido* and without any reservation whatsoever, it is clear that the true spirit and intent of this deed was, that if the estate of Coo Vythilingum was not sufficient to pay the debts due to the creditors of the bankruptcy, V. Sooprayen & Co. were bound to pay them out of their own moneys, and if they were bound to pay in case of insufficiency, as a consequence, if there is a surplus, that would belong to them.

We cannot, therefore, consider that this is an ordinary case of trust and that the appellant can be entitled to any surplus which may result from the management of the estate by Nagapoullé Sooprayen.

It was stated in the course of the argument here, that that was not the true issue before the Judge in Bankruptcy, that it was only by the respondent, who was the defendant in the Court below, that that issue of the question of the surplus was raised, that it was part of the argument of the respondent there, and that what was merely intended by the appellant was to have an account of the management in order to see what had been done with the property, and that the bankrupt Coo Vythilingum was entitled to know what was done with his property by his trustee and to have proof of the payment of his creditors. But when we examine the procedure in this case, we think that what was really intended was not to obtain proof of the payment of the debts of the bankrupt by Nagapoullé Sooprayen. There can be no doubt that Coo Vythilingum is entitled to know and to have proof that his debts have been fully paid by Nagapoullé Sooprayen, who acted as the assignee of his estate and as his trustee; but in our opinion that was not the issue which was raised before the Judge in Bankruptcy. If Coo Vythilingum had applied for such a proof as that he would certainly have been entitled to obtain it. But from the procedure which is before us, we do not consider that he made an application of that nature. The wording of the petition is that he should obtain an account with vouchers, that is to say, he merely wanted to know whether after payment of his debts there was a surplus. As we have already stated, we have no hesitation from the wording of the assignment here in saying that there was not a resulting trust entitling him to any surplus.

It was also stated by the learned counsel for the appellant that such an issue about the surplus could not have been raised and should not have been decided by the Judge in Bankruptcy, because the real assignees in the case where V. Sooprayen & Co. and they were not sufficiently represented before the Court; but we think that that is a mistake because Nagapoullé Sooprayen is called here as a managing member of that firm, and in his capacity of managing member he sufficiently represented the firm, and all the issues concerning the rights of the firm itself could certainly have been raised and argued before the Judge in Bankruptcy.

An authority was quoted to us upon which the Master gave his decision, namely the

case of Wilcocks reported in the Law Journal Reports, Vol. 44, New Series, page 13, and it was stated by the Counsel for the appellant that that authority was not in point.

We have read that authority and we think that it is quite in point with regard to the deed of assignment and its consequences. The only difference which we see is, that in the case of Wilcocks, there was an immediate release, but we do not find that this difference is sufficient to allow us to set aside the authority as not bearing exactly on the point which is at issue between the parties. That difference does not certainly affect the nature and extent of the assignment. In the case of Wilcocks the assignment was unconditional as it is in the present case, and it was precisely on the question of the nature of the assignment and of its extent, that the Judge in Bankruptcy there held that the trust was not an ordinary trust, and that the party who made such an assignment was not entitled to any surplus, if any surplus remained.

We, therefore, see no grounds here for this appeal and we must dismiss it with costs.

SUPREME COURT

CERTIORARI—EXECUTION OF JUDGMENT TAKEN IN MAURITIUS BEFORE CONSUL AT MADAGASCAR—COMPETENCY—DISPUTE OR DIFFERENCE—ORDER IN COUNCIL OF 1869—JURISDICTION OF THE COURT—FOREIGN JUDGMENTS—NEW JUDGMENT COMPETENT—WRIT REFUSED.

A who had obtained judment before the Supreme Court of Mauritius sued execution against B *his debtor, who resided at Madagascar, before the Consular Court there.*

The writ of execution was issued by the Consular Court.

The debtor moved the Supreme Court for a writ of certiorari and a stay of execution, on the ground of want of jurisdiction of the Consular Court.

Held:

1o. *That it may be considered that the question of the execution of a Mauritius judgment between British subjects, is a "dispute" or "difference" between such British subjects within the Consul's jurisdiction, when such British subjects appear before the Consular Court, even though the original cause of action between them arose only partially in Madagascar—(Order in Council of Feb.* 1869, *Sect.* 25 *&c.)*

2o. *That if it behoved the Consul to regard the judgment of the Supreme Court of Mauritius as a foreign judgment, still his Court was the only Court at Madagascar that could enforce it, the jurisdiction exercised by the Malagasy authorities being expressly taken away by the terms of the treaty between Great Britain and Madagascar, in matters relating to British subjects.*

3o. *That in that light, the action of the Consul was virtually, if not technically, consistent with that followed by British Courts in England, with regard to judgments obtained in Courts of competent jurisdiction.*

4o. *That the Consular Judge, thus acting, accepted such judgments as being "prima facie" conclusive between the parties, while he virtually raised the issue of its validity by calling upon the judgment debtor to show cause against its execution.*

5o. *That it would, however, have been competent for the judgment creditor to have taken judgment again in the Consular Court against his debtor.*

Writ applied for refused, with costs.

OLLIER,—Plaintiff.

and

SAUZIER AND ORS,—Defendant.

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Before

His Honor Sir E. J. LECLEZIO Kt.,—Chief Judge.

and

His Honor F. C. WILLIAMS,—Puisne Judge.

—

V. K/VERN,—Counsel for Plaintiff.
G. RITTER,—Attorney for the same.

L. CHASTELLIER,—Counsel for Defendants.
W. EDWARDS,—Attorney for the same.

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Record No. 24,543.

20*th. November* 1888.

The question in this case is whether a judgment obtained in this Court by a British subject against another residing in Madagascar can be rendered executory by the British Consular Court of Madagascar—Judgment was obained here in 1883, and in the early part of the present year, the judgment being still unsatisfied, the judgment creditor followed his debtor to Madagascar, where he is domiciled, and obtained against him a rule in the Consular Court to show cause why the judgment obtained in Mauritius should not be enforced. The judgment debtor appeared in the Consular Court and pleaded a want of jurisdiction. But, as the Consular judge appears to have thought that he had no good ground for believing that the present applicant would either move this Court for a writ of certiorari, or would appeal from his decision, he, in due course, on proof of the original judgment, issued the writ of execution upon which we are now asked to stay proceedings. The present application being made after the Consular judge had determined the matter before him, we might, strictly following the judgment of the Court in the recent case of "Pellicier v. Haggard", hold that the application for the writ comes here too late; but as an application for a stay of proceedings during the course of them appears to have been made to the Consular Court, and as the affidavits before us disclose the whole case as it presented itself to that Court, we think it best to regard the application for a writ of certiorari as having been duly made, in order to settle by our judgment the question of jurisdiction.

The Order in Council of the 4th. of February 1869 gives the British Consular Court of Madagascar jurisdiction in all "suits, "disputes, differences and cases of litigation "of a civil nature arising between British "subjects in Madagascar" and by S. 25, it gives to this Court concurrent jurisdiction with the Consular Court in all such matters. The orders does not expressly provide for the reciprocal execution of judgments by the two Courts.

It might fairly be argued, however, that the question of the execution of a Mauritius judgment between British subjects is a dispute or difference between such British subjects within the Consul's jurisdiction, when such British subjects appear before the Consul's Court, even though the original cause of action between them arose only partially in Madagascar. But on the other hand, if it behoved the Consular judge to regard the judgment of this Court as a foreign judgment, it is to be observed that his Court was the only Court in Madagascar that could enforce it, jurisdiction exercised by the Malagasy authorities, in matters relating to British subjects, being expressly taken away by the terms of the treaty between Great Britain and Madagascar Regarded in this light, the action of the Vice Consul as judge in the matter before us appears to have been virtually, if not technically, consistent with that followed by British Courts in England in the case of a foreign judgment obtained in a Court of

competent jurisdiction, that is to say, the Consular judge accepted such judgment as being *prima facie* conclusive between the parties, while he virtually raised the issue of its validity by calling upon the judgment debtor to show cause against its execution.

For the judgment creditor to have taken judgment again in the Consular Court, might have been a safer and more regular course to have adopted before proceeding to execution; but, in a case like this, where the original debt and where the validity of the judgment pronounced here in respect of it have never been disputed, we should be most unwilling to allow the debtor to take advantage of any technical informality in the subsequent proceedings in order to escape his responsibility.

For these reasons, we are indisposed to to interfere with the discretion exercised by the Consular judge in this matter and we must refuse the writ applied for with costs.

SUPREME COURT

RAILWAY RATES OF CONVEYANCE—RULES AND REGULATIONS — EXCEPTIONAL CIRCULAR — CASE NOT WITHIN THE EXCEPTION—CIRCULAR 142 OF 1884—CASE DISMISSED—COSTS.

The Railway Department under certain Rules and Regulations, stated that the charges for conveyance of syrup and rum would be the same as for the conveyance of Sugar.

Several years after, under Circular No. 142 of July 1884, the rate for the conveyance of Sugar from Mahébourg and Souillac was reduced, and the reduction was to apply only to the Estates who sent the whole of their sugar by rail.

The Plaintiff contended that the reduction should apply to rum sent by him by rail.

By the Court:

1o. *The Rules and Regulations of the Railway are general and apply to all the Railway Traffic, including conveyance of sugar, rum etc.*

2o. *Circular No. 142 of 1884, is exceptional. It applies to two stations and to certain estates only. Its terms restrict the reduced rate to certain sugars merely, and no mention of rum appears therein.*

Case dismissed with costs.

MOREL,—Appellant.

and

THE COLONIAL SECRETARY,—Respondent.

Before

His Honor: Sir EUGÈNE LECLÉZIO Kt.,—Chief Judge.

and

His Honor A. MURE,—Puisne Judge.

H. GALÉA,—Counsel for Appellant.
W. LEBLANC,—Attorney for the same.

The Hon. L. ROUILLARD, Substitute Procureur General, — Counsel for the Respondent.
J. GUIBERT. Crown Attorney, — Attorney for the same.

Record No. 911.

29*th. November* 1888.

JUDGMENT

Delivered by Mr. JUSTICE MURE.

This is a claim for the repayment of a sum of Rs. 826.62 being the amount of certain sums which are said to have been paid in excess by the Plaintiff and Appellant, a distiller, for the conveyance of rum from Mahebourg to Port Louis, between the dates of July 1884 and July 1887.

The facts upon which this action arises are the following: The Railway Department made certain regulations in regard to the goods traffic many years ago. The

15th. Article of those regulations says that the charges for the conveyance of syrup and rum, when sent in quantities of not less than three tons, are to be same as those for the conveyance of sugar, and that is a general regulation applicable to the whole of Mauritius. But it appears that in 1884, the revenue of the Railway being affected by the competion of coasters from Mahébourg and from Souillac, the Railway Department issued a circular, No. 142 of the 3rd. July 1884, to the effect that the rate for sugar would be in future Rs. 3 per ton ; the reduced rate applying only to Estates sending the whole of their sugars by Railway and this circular applies only to the Stations of Mahébourg and Souillac.

It appears that Mr. Morel had continued to pay the price of Rs. 4.10 for the conveyance of rum after the issuing of this circular, as he had done before, till a certain day in 1887 when he chanced to go to the Railway Station to send some molasses to Port Louis, and, as he says, when he offered the Rs. 4.10 per ton ; the Station Master informed him that the charge was only Rs. 3 per ton in virtue of the circular, and that he then, for the first time, became aware of the terms of the circular. He now brings on action for the repayment of the sum which he alleges to have been overpaid for the conveyance of rum from Grand Port to Port Louis between the date of the issuing of the circular and the date of his discovery of its terms.

We have carefully considered the Regulations of the Railway Department and also the interpretation which ought to be put on this circular, and, in short, we are of opinion that while the rules and regulations are general and apply to all the Railway Traffic, that they apply undoubtedly both to syrup and to rum, and make arrangements that they shall not be charged at a higher rate than sugar, yet we consider that this circular is exceptional, issued in exceptional circumstances, and that if it were to be held to include rum, that spirit would have been mentioned. Take the terms of the circular. In the first place, it applies only to two of the stations, of all the stations, of the Railway ; in the second place, it is a condition of the circular that the reduced rate shall apply only to estates sending the whole of their sugar by rail.

Now, we cannot say that any unfairness or injustice in the charges has been committed towards the appellant, Mr. Morel, by his having subsequently continued to pay the ordinary rate for the carriage of his rum, as he had paid before. It is true that the officials of the Railway Department reduced the charge for molasses and syrup, and they did so upon the strange ground that they considered those articles to be a low kind of sugar, but we do not think that that effects the present question.

They may have made a mistake or they may have acted as they were directed to act, but as we are dealing with a different substance altogether—rum—we are bound to interpret this Circular No. 142 according to its terms, and these terms, we think, restrict the reduced rate to the two stations of Mahébourg and Souillac and confer an advantage in favor of those estates which send all their sugars from those stations to Port Louis and it is, of necessity, limited to the special case therein mentioned.

That is the legal interpretation which we have put upon the circular of the 3rd. July 1884, and by that we think this question, must be decided.

We, therefore, dismiss this appeal with costs.

SUPREME COURT

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LIBEL—DAMAGES—TIME—PLACE—PERSONS—PARTICULARS OF THE CLAIM—RULES WHICH OBTAIN IN ENGLAND—AMENDMENT OF DECLARATION—COSTS.

The defendant was sued for having, during the months of August and September 1888, *used defamatory language concerning plaintiff to several persons.*

The defendant having applied for particulars and the plaintiff having refused the same, it was held by the Court, upon a reference from the Judge at Chambers:

1o. *That it is now settled practice in England, that the defendant is entitled to particulars of the places where, the times when, and the persons to whom the alleged slanders and libels were published — if such details are not given in the statement of claim.*

2o. *That a defendant is entitled to know the case that is going to be made against him; but that a plaintiff, on the other hand, cannot be compelled to give the names of the persons passing in the street at the time the alleged slander was uttered, nor the names of all who take the newspaper, when the libel has been published in a newspaper.*

3o. *That, in conformity with the above rules, the plaintiff here should give the names of the persons in whose presence the defamatory language was used and also the places at which it was used.*

Costs of the incident reserved.

—

CANAL AND WIFE,—Plaintiffs.

and

PHILIPINI,—Defendant.

—

Before

His Honor SIR E. J. LECLÉZIO, KT.,—Chief Judge.

and

His Honor A. MURE,—Puisne Judge.

—

Y. JOLLIVET,—Counsel for Plaintiffs.
A. ROHAN,—Attorney for the same.

W. NEWTON,—Counsel for Defendant.
H. THATCHER,—Attorney for the same.

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Record No. 24,641.

29*th. November* 1889.

JUDGMENT

Delivered by His Honor THE CHIEF JUDGE.

In this case, which is an action in damages for slander, the plaintiff had alleged certain facts which according to count 2 of the declarations took place in the month of August and September.

The defendant is charged with having during those two months spoken to many persons certain words concerning the plaintiff which are considered by her as being defamatory.

The defendant applied to the Judge in Chambers, in order to have particulars in these terms: "to show cause why the plaintiff should not be ordered to amend the "second count of the declaration by furnishing to defendant all the particulars "connected therewith and precising the "facts therein mentioned, that is to say, "naming the dates, the persons therein "alluded to, and the places where those "alleged defamatory words were uttered."

Before the Judge in Chambers, the plaintiff's attorney stated that the facts alleged

in the declaration took place during the months of August and September last, and he objected to the amendment moved for on the ground that he is not bound to give at present the names of his witnesses, and that the proper time for giving their names will be when the notices of facts are served. Before the Court here, the same argument was repeated.

We have examined what the practice is in England with reference to this matter, and we read in Odger's Digest of the Law of Libel and Slander p. 533 that "it is now "settled practice that the defendant is enti- "tled to particulars of the places where, the "times when, and the persons to whom, the "alleged slanders or libels were published, if "such details are not given in the statement "of claim. It is no objection that the "defendant must know already to whom he "spoke and wrote; he is entitled to know "the case that is going to be made against "him, but, of course, the plaintiff cannot be "compelled to give the names of the persons "passing in the street at the time the "alleged slander was uttered, nor can any "person libelled in a newspaper be expected "to know the names of all who take the "newspaper."

In the same work, at page 633 we find what sort of particulars are to be given. For instance, in a case of spoken slander "the "said slanders were uttered in the month "of December of — in the presence of — "street — in the said street, in the said city" and so on.

We have examined the procedure before the Court and we think that with regard to the dates they are sufficiently stated in the declaration by giving the months, and more especially after the statement made before the Judge in Chambers by the attorney of the plaintiff that it was during the whole of those months that the alleged slanders were spoken. We think, however, that the declaration is insufficient with regard to the allegation that the slanders were spoken to many persons.

In conformity with the practice, which appears from the book I have referred to, to be followed in England, we think that the names of the persons should be given in the declaration, and also the places where the words were spoken.

We also think that the costs of this incident should be reserved.

SUPREME COURT

In this case which is an appeal from a decision of a Judge at Chambers, it was urged that the Judge has no jurisdiction to hear and decide an application for the validity of an attachment, when the application is opposed.

It was submitted by appellant that he should have referred the matter to Court.

For the respondent, it was argued "inter alia" that if the Judge had no jurisdiction to decide upon the application, he had none to refer the matter to Court.

By the Court:

(*a*). *It is clear that under Schedule A of Ordinance 6 of 1855, the Judge at Chambers has no jurisdiction to hear and decide on the validity of an attachment which is opposed.*

(*b*). *But as the opposition is not disclosed, sometimes, till parties are before the Judge in Chambers, it is a convenient and reasonable practice that he should at once and as a matter of course refer it to the full Court.*

Judgment of the Judge at Chambers set aside, application for the validity of the attachment referred to Court, costs reserved.

NAIRAC,—Appellant.

and

HODGSON,—Respondent.

—

Before

His Honor A. MURE,—Puisne Judge.

and

His Honor F. C. WILLIAMS,—Puisne Judge.

—

Y. JOLLIVET,—Counsel for Appellant.
THATCHER,—Attorney for the same.

V. K/VERN,—Counsel for Respondent.
ROHAN,—Attorney for the same.

—

Record No. 24,645.

7th. December 1888.

This is an appeal from chambers ; and the principal ground on which it is based is that the learned Judge had no jurisdiction in chambers to hear and decide an application for the validity of an attachment, the application being opposed before him by the defendant, now the respondent.

It may be true, as was argued for the Respondent, that Ordinance 6 of 1855 does not confer jurisdiction upon the Judges of this Court, but at the same time, as its preamble affirms, one of its objects was to settle certain doubts as to the jurisdiction possessed by a Judge in Chambers, and in that sense, to regulate and define such jurisdiction. Its section 2 declares a judge competent, unless he desires to refer to the Court, to deal finally with certain matters specified in a Schedule to the Ordinance. One of the matters specially excepted from such jurisdiction in the schedule is an opposed application for the validity of an attachment. This special exception appears to have escaped the notice of the learned Judge in Chambers in the present case, and not his alone, but that of both the contending parties, who, both, argued the application on its merits, without any question being raised as to the jurisdiction.

This fact, however, we cannot regard as taking away a right of appeal based upon the ground that, as a matter of law, the learned judge possessed no jurisdiction to decide the matter. It was argued for the respondent that a judge in Chambers in Mauritius possesses identical powers with a judge of Queen's Bench Sitting in Chambers in England, who, it was alleged, could have adjudicated in such a case as this. But, even if that were so, of which we are not convinced, we are not aware that the English practice is governed by a kindred statute to our Ordinance 24 of 1855.

It was further argued that if the judge had no jurisdiction to decide the application, he had none to refer to Court. But opposition is not always disclosed till parties are before a Judge in Chambers, and we think the practice is a convenient and a reasonable one that, when the fact of opposition shows the Judge that he is unable under the Ordinance to deal with an application in Chambers, he should at once, and as a matter of course, refer it to the full Court.

Our order is that the judgment given in this matter in Chambers be set aside, and that the application for the validity of the attachment be referred to the Court.

Costs reserved.

SUPREME COURT

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CHARTERPARTY — LAY DAYS — DEMURRAGE — NOTICE—CUSTOM OF TRADE—DELAY IN DEPARTURE OF SHIP— REASONABLE HOUR FOR LOADING—COSTS.

Under a charterparty, 20 days for loading were allowed to the charterer, commencing twenty four hours after written notice by

the Master, of the ship's readiness to receive cargo.

The running days on demurrage were further allowed at the rate of Rs. 350 per diem payable day by day as incurred.

The Master having entered an action for Rs. 2,400 for demurrage, the charterer pleaded:

(a.) That, according to the Custom of trade in Mauritius, the lay days were to run not on the day following reception of the notice, but on the next following day, in as much as the notice was received after noon.

(b.) With regard to demurrage, that on several occasions Plaintiff could not ship merchandise brought alongside his ship.

(c.) That, part of the sum claimed under the head of demurrage was really claimed because plaintiff alleged that he had been detained in Mauritius to follow up the present action.

By the Court:

With regard to (a).

1o. The evidence seems to show that the letter was delivered at about noon.

2o. There was no proof of the Custom of trade relied upon by defendant.

With regard to (b).

Part of the goods could not be shipped, because they reached the vessel after working hours.

With regard to (c).

No indemnity is due to plaintiff for having delayed his departure in order to bring his case before the Court.

Judgment went for plaintiff in the sum of Rs. 1,750, with costs.

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WAICOTT,—Plaintiff.

and

HAJEE CASSIM MAMOOJEE,—Defendant.

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Before

His Honor F. C. WILLIAMS,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

L. CHASTELLIER,—Counsel for Plaintiff.
RITTER,—Attorney for the same.

G. GUIBERT,—Counsel for Defendant.
GANACHAUD,—Attorney for the same.

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Record No. 24,557.

10*th. December* 1888.

The *Erin's Isle*, a British ship of the measurement of 1,799 tons or thereabouts, was chartered in Calcutta on the 16th April 1888 to take, in Mauritius, a full cargo of molasses in casks.

Twenty working days were allowed to the charterer for loading at Mauritius, commencing twenty four hours after written notice, by the Master, of the ship's readiness to receive cargo. Ten running days on demurrage were further allowed at the rate of Rs. 350 per diem, payable day by day as incurred.

The *Erin's Isle* arrived in Mauritius in the early part of June 1888. On the 14th June, the plaintiff wrote to defendants intimating that the ship was ready to take in cargo and that the lay days would commence on the following day. The defendants, by a letter bearing the same date, objected to the lay days commencing as proposed, but agreed to load cargo under a stiffening order, until the cargo of the *Erin's Isle* was landed and the vessel entered outwards at the Custom House. The defendants began on the 18th June loading the vessel under the stiffening order and continued to send in cargo daily

until the 28th June 1888, when the plaintiff addressed to the defendants the following letter.

"Dear Sir, — My vessel being entered outwards at the Customs and ready to receive cargo, I beg to give you notice that my lay days will begin to count to morrow."

To this notice no reply was given, and, from a tabular statement which forms part of the evidence in the case and which is admitted to be correct, it appears that the defendants continued sending in cargo at about the same rate as before. On the 23rd July at noon, according to plaintiff's calculation, the lay days allowed by the charterparty expired, and from that time until the 28th July at noon, demurrage was claimed from day to day, defendants having, by notice dated 27th July, informed the plaintiff that they would not ship any other goods beyond those which would be laden on that day.

The claim for demurrage was resisted by defendants on the ground that, on several days forming part of the lay days, a certain number of casks of molasses sent alongside to be shipped, had been returned. The contention of the defendants was that, on account of the failure of the plaintiff to receive cargo, as above stated, the lay days allowed by charterparty ought to extend until the 30th. July. In other words, that the days, seven in number, on which the *Erin's Isle* had not shipped all the casks sent alongside, ought not to count as lay days. In his action, the plaintiff claims Rs. 1,750 for demurrage from the 23rd. July at noon up to the 28th. July at noon, at the rate of Rs. 350 a day, besides a daily sum of Rs. 350 for further demurrage, on account of the ship being detained by the present action. The ship having left Mauritius on the 4th. August, the sum claimed for further demurrage amounts to Rs. 2,400.

The first point raised by the defendant's pleas is the date at which the lay days allowed by charterparty began to run. As before stated, the letter to defendants, intimating that the lay days would commence, is dated the 28th. June. The plaintiff has tendered no evidence of the exact hour at which the letter conveying the intimation was handed over the defendants, but Mr. Ireland, one of the agents of the ship, swore that the letter had been written by him between 10 and 11 on the 28th. June, and that, by the rule of his firm, the letter must have been despatched at once, or at least before twelve o'clock. One of the defendants, on the other side, stated on his solemn affirmation that he received the letter at 2.30 on the 28th. June and, by virtue of a Custom of Trade, which, as he alleges, prevails in Mauritius, he contends that the lay days in this particular case ought to have begun on the 30th. June. According to his view, in cases like the present one, when the lay days are to begin twenty four hours after notice, if the intimation is given after noon on a particular day, the lay days are to begin, not on the following day, but on the next following day. Of that custom or usage of trade, no satisfactory evidence was produced, but the Court cannot fail to be struck by the fact that the defendants, having received plaintiffs letter at an hour which, according to defendant's view, justified their claiming that the delay for loading the ship would begin, not at the date fixed in the letter, but on the day following, raised no objection to plaintiff's letter of notice. In a notice which preceeded this action the defendants reckoned from the 23rd. of July the extra lay days claimed by them. This renders most probable plaintiffs allegation that the letter above alluded to, which was written on the 28th. June between 10 and 11 o'clock, must have reached the defendants early on that day. On this point the Court rules in favour of plaintiff.

In defence to the claim raised for demurrage, it was proved to the Court, that on seven occasions, during the lay days, a certain number of casks of molasses, brought along side the *Erin's Isle*, were not shipped, and in consequence were returned. The plaintiff did not deny that fact, but gave as a reason that on the occasions above stated the casks had been brought alongside too late to be shipped. Evidence was produced by the Plaintiff to the effect that the lighters of the Mauritius and Albion Docks did not often reach the vessel until four o'clock in the afternoon, and, as work ceases in the harbour at five o'clock, the lighters had to return, partly discharged.

This fact is specially mentioned in several receipts given by the ship during the last days. The defendants, on the other hand, produced general evidence that the lighters never left the docks later than 2,30 p.m. and must have reached the ship at or before 3 p. m. In presence of these contradictory statements, it would have been difficult to ascertain the real facts of the case, had it not been for a collateral circumstance which gives great weight to the evidence of plaintiff. The Court was informed by the witnesses, both of plaintiff and of defendants, that one gang of sixteen men, working on board ship, could load 275 or 300 casks of molasses in a day. As a matter of fact, the plaintiff, who during the first lay days. had employed two gangs of men, subsequently kept only one gang of men on board. On looking at a tabular statement which is accepted by defendants as correct, it appears that, on the seven days on which the plaintiff is alleged to have failed in performing his agreement, the number of casks brought alongside, including those returned, was 1618, making for seven days an average number of 230 casks per day. The average of the other lay days was even less. One gang of men, as employed by plaintiff, was therefore fully equal to the work to be done, and if, on certain days, casks were returned, it must have been, as stated by the plaintiff, because they were not brought alongside the ship at a reasonable time. It is probable that if two gangs of men had been kept, all the casks might have been shipped, but, surely, the plaintiff could not be expected to engage two gangs of men able to ship 550 or 600 casks, whilst the average number of casks brought alongside by defendants barely reached two hundred a day. We hold therefore that plaintiff has fully proved his claim for five days demurrage.

The plaintiff founds his claim of Rs. 2,400 for further demurrage on the fact that he was detained in Mauritius until the fourth of August by the legal proceedings instituted by him against the defendant. On careful consideration, the Court does not see on what legal ground that claim can be urged. It is quite conceivable that the plaintiff should have deferred his departure for a few days on account of the difficulties which had arisen between him and the charterers, and more especially, for the purpose of causing the evidence of some of the officers and men of his ship to be heard. But if viewed in the light of a claim for damages or indemnity, the loss which resulted to plaintiff from his prolonged stay in this Colony is a very remote cause of damages. On the other hand, it cannot be said that it was contemplated in the agreement between the parties that, on failure by defendants to pay their debt for demurrage, the time necessary to enable the plaintiff to follow up an action in a law Court would be added to the claim for demurrage.

The learned Counsel for the plaintiff could not cite a single case directly in support of his argument, and we have been unable to discover any definition of demurrage which would cover delay caused to a ship owing

to its master taking preliminary proceedings for bringing an action against the charterer. In Tringle v. Mollett (Mason Welsly 6. p. 80) where demurrage was claimed for further detention of a ship in harbour by ice, it was held by the Court that in order to render the defendant liable, the detention must have been for purposes of loading.

But in fact, the claim of the plaintiff for five days demurrage does not differ from an ordinary claim for a debt which might have become due to plaintiff in the colony, and surely in such cases, the plaintiff could never have been allowed to add to his claim an indemnity for having delayed his departure in order to bring his case before a Court.

Judgment for the plaintiff in the sum of one thousand seven hundred and fifty Rupees, with costs.

SUPREME COURT

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RIGHT OF ACTION—BRITISH CONSUL AT MADAGASCAR — REFUSAL TO HEAR A CASE—PRIVILEGE OF HIGH AND INFERIOR COURTS—CONSULAR COURT—ACTION LIES—ABUSE OF AUTHORITY—DAMAGES—COSTS.

An action in damages having been brought against the Consular Judge of Madagascar for an abuse of his judicial authority, in refusing to hear a case brought before him, the Court held :

1o. *That against the Judges of the Superior Courts of Record in England, no action lies for refusal to act.*

2o. *That the British Consular Court at Madagascar should be looked upon; not as a Superior, but as an inferior Court of Record.*

3o. *That against inferior Courts in England, the remedy would be an injunction.*

4o. *That the Supreme Court of Mauritius has no power to issue an injunction to the Consular Court of Madagascar.*

5o. *That, as no appeal lies from the Consul's refusal, the only civil remedy to the litigant is an action in damages.*

6o. *That the Consul here had acted in abuse of his judicial authority in refusing to hear a case brought before his Court.*

Damages Rs. 200 *and costs of suit.*

—

PÉLICIER FRÈRES,—Plaintiff.

and

HAGGARD,—Defendant.

—

Before

His Honor Sir E. J. LECLÉZIO KT.,—Chief Judge.

and

His Honor F. C. WILLIAMS,—Puisne Judge.

—

W. NEWTON,—Counsel for Plaintiff.

F. ROBERT,—Attorney for the same.

The Hon. LOUIS ROUILLARD, Substitute Procureur General,—Appears for Defendant

J. GUIBERT, Crown Attorney,—Attorney for the same.

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Record No. 24,284.

11*th. December* 1888.

This is an action against the Judge of the British Consular Court of Madagascar for damages for acting in excess of his jurisdiction, or without jurisdiction, and abuse of his judicial authority. From the record as furnished to us by the defendant, and from the defendant's own examination *de bene esse* before the Master of this Court, it results very clearly that the Consul acting as Consular Judge, with the best of intentions, no doubt, but from knowledge privately obtained, refused to entertain the plaintiff's

claim, or to hear Counsel in support of it. That this decision to reject a plaint without hearing evidence or argument in support of it was the assumption of a power to decide a case without hearing it, which power the defendant did not possess, was the argument submitted to us by Counsel for the Plaintiffs and we have come to the conclusion that the plaintiffs are entitled to a verdict.

The status and position of the British Consular Court in Madagascar is analogous rather to that of the County Courts and Courts of quarter sessions, than to that of the Superior Courts, in England. But we held, in an interlocutory judgment, that the Consular Judge was entitled generally under the order in council, to such statutory protection as is accorded to Judges of inferior Courts of Record in England. The protection is ample when jurisdiction is not exceeded, and where no malice is alleged (Pitt Lewis County Courts Practice). Here no malice is alleged, but here the Judge was guilty of laches for which the English law affords a remedy only in the case of Courts in England itself. What he did was practically to refuse to hear a case and in England, as was justly remarked by his Counsel before us, a superior Court of Record would no doubt have ordered the Judge to hear it, and would have possessed discretionary power to mulct him in the costs of the application made to it for that purpose. But we cannot hold that we stand towards the Consular Court of Madagascar in the position of the English Superior Court of Record just alluded to. Our powers in relation to that Consular Court are, in fact, strictly defined by the Order in Council, relative to consular jurisdiction in Madagascar, of the 4th. February 1869. This order endows us with concurrent jurisdiction in civil matters with the Consular Court, and with the powers of a Court of appeal from its decisions in certain cases. But we no where find that it invests us with such control over its proceedings as would oblige it to obey a mandate from this Court to act, or to put its own judicial machinery in motion. This being so, the question in the present action, as it has preeented itself to our minds, has been: does the Madagascar litigant possess no civil remedy at all against his British Judge who refuses to hear his case? To this question we are unwilling to return an affirmative answer.

Precedent, so far as we can ascertain, affords for our guidance no case in point Against inferior Courts of record in England refusing to act, the remedy, as we have said, is always by injunction; and we know of no case where, a superior Court of record having refused to exercise its functions when duly applied to, an action for damages has resulted. But we can conceive that, from a Judge or a bench of Judges from whom no appeal lay to compel them to act, such damages might be claimed in an action at law as might have been the direct result of such refusal. For, if the abundant and extensive privilege claimed for the higher English Courts by certain of their learned Judges be held to cover such an exercise of judicial discretion as is involved in a refusal to act judicially, we are not prepared to invest the British Consular Court of Madagascar with the attributes of so exalted a tribunal. Nor is it in fact upon a par, as regards its status, with the English high Courts of Justice or superior Courts of record. It must be understood that we do not find the defendant liable for any act or thing done within the scope and limits of his judicial discretion. Such an act might consist in a refusal to grant an application for a summons which the Judge might think unreasonable. The liability of the defendant is for acting upon his private and not upon his judicial knowledge and

discretion in refusing, practically, to hear a case altogether.

This we think must be held to fall within the category of an actionable abuse of authority, where damage to a litigant has been its result. No special damage has been proved in the present case, and we think its exigencies will be sufficiently met by a verdict for the Plaintiff for two hundred Rupees and costs of suit.

SUPREME COURT

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JURISDICTION OF DISTRICT COURT—CRIMINAL SIDE—COLORABLE TITLE—TRESPASS—CERTIORARI—CASE SENT BACK TO MAGISTRATE—ORDER OF NON INTERFERENCE—INJUNCTION—COSTS.

Certain parties prosecuted for trespass upon a certain land, pleaded that they considered themselves as owners of the same.

Thereupon, the Magistrate after hearing complainant who admitted that there were certain proceedings pending before the Supreme Court with regard to the ownership of the said land, postponed the case till a decision had been given by the higher Court, and in the meanwhile ordered accused not to trouble the complainant in his possession of the land.

The case having been brought by accused for review by Certiorari, the Supreme Court held :

1o. *That it is not sufficient for parties to set up as a defence that they bonâ fide believed that they had a colorable title, but they must show to the satisfaction of the Magistrate that they really had a colorable title.*

2o. *That the Magistrate here should not have decided the case merely upon the evidence of the complainant but should have gone further into the evidence bearing upon the question of title.*

3o. *That the case should be sent back to the District Court for the above object and in order that it should acquit or convict the accused after having taken cognizance of the whole evidence.*

4o. *That the Magistrate had no jurisdiction to give to accused the order not to disturb the complainant, and that complainant's remedy would be by way of injunction obtained from the Supreme Court.*

Each party having been sucessful in a certain measure, the costs were divided.

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ROSE AND ORS,—Plaintiffs.

and

THE DISTRICT MAGISTRATE OF MOKA AND ANOR,—Defendants.

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Before

His Honor Sir E. J. LECLÉZIO KT.,—Chief Judge.

and

His Honor A. MURE,—Puisne Judge.

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H. GALÉA,—Counsel for Plaintiffs.
SAUZIER,—Attorney for the same.

G. GUIBERT,—Counsel for Defendants.
A. BÉTUEL,—Attorney for the same.

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Record No. 24,564.

14*th. December* 1888.

JUDGMENT

Delivered by His Honor THE CHIEF JUDGE.

This case comes before us by way of a writ of certiorari with the object of obtaining the reversal of a jugdment of the District Magistrate of Moka in the matter of a complaint entered against the applicants by Mr. Vuillemain under Article 8 of Ordinance No. 8 of 1869, for shooting game on his land called "La Mare des Rameaux", which

he bought in 1858 and which forms part of the concession Herberean de la Chaise.

It appears from the Record that the plea before the Magistrate was that the accused parties went on part of that land because it was the property of the heirs Herbereau de la Chaise, of whom the applicant Rose is one, the other applicants having authority from the heirs to shoot on the land, one of them being also appointed custodian of the land; they also deny that Mr. Vuillemain is in possession of this land. Before the Magistrate it appears that the only party who was heard was Mr. Vuillemain. He gave the boundaries of the plot of land which he said belonged to him in virtue of titles and also by prescription; and when cross examined, he stated that persons alleging themselves to be the heirs Herbereau de la Chaise, had tried to obtain a licitation of that same land before the Master, that he had objected to it and finally had entered an action in the Supreme Court with regard to the ownership of the land. At that stage of the proceedings, the learned counsel for the parties charged put in the declaration in the case which had been entered before the Supreme Court and moved for the acquittal of the accused. The Magistrate said he would not give judgment on that day but that he would adjourned the case *sine die* to await the decision of the Supreme Court in the case pending before it, and upon the motion of the attorney for Mr. Vuillemain, he ordered the accused parties not to disturb the possession of Mr. Vuillemain until the decision had been given in the case which was adjourned *sine die*. Thereupon, the application for a certiorari was made to this Court.

Before us, it was argued that the mere fact that there was a lawsuit before the Supreme Court and that the boundaries given in the declaration filed before the Court were the same as those mentioned in the plea of the accused before the Magistrate was sufficient to show that they had a colorable title, and that as the question of ownership was in discussion before this Court, the Magistrate ought to have immediately discharged the accused parties before him. We have examined the various authorities which were quoted to us upon that question of colorable title.

The first was Hunt v. Andrews (3 Barnewell and Alderson Vol. 3 p. 346) the second, Cornwell v. Saunders (Law Journal Reports, Vol. 32 p. 7 New Series, Magistrates cases); and the third was Watkins v. Mayor (Law Journal Reports Vol. 44 p. 165, New Series, Magistrates cases.)

It results from the English jurisprudence on these questions that it is not sufficient to set up as a defence that the parties bonâ fide believed that they or the parties under whose authority they acted had a colorable title, but it must be shown to the satisfaction of the Magistrate, (of the Justices of the Peace in England) that they really had a colorable title. Now, in this case, the only evidence the Magistrate had before him when he stopped the case was, first, the statement of Vuillemain that he had entered the law suit, and then the declaration which was entered by Vuillemain before the Supreme Court showing what was the nature of the law suit and what were the boundaries of the land which was the subject matter of the suit, but the Magistrate had not even the plea of the heirs La Chaise filed in the Supreme Court in order to see what was the real issue joined, and whether the defendants alleged that they were the owners of the land the boundariss of which were given in the declaration; in fact, he had no other evidence than the declaration in the law suit begun before this Court by Vuillemain, which would rather show that the defendants had not a colorable title. We must therefore come to the conclusion

that the Magistrate was wrong in stopping the case so soon; he ought to have gone further into the evidence of both parties to see what was the colorable title which the accused wished to set up in their defence.

We think, therefore, that we should refer back this record to the Magistrate in order that he should hear further evidence on the question of title. If he is satisfied that the accused not only believed that they, or those under whose authority they acted, had a colorable title, but that, in reality, they had a colorable title, because that is what the Magistrate is to be satisfied with, then we think that his duty under such circumstances, following the jurisdiction of the English Courts on that question, is to discharge the accused parties; but if he is not satisfied that they had a colorable title, then, of course, he must go into the merits of the charge itself and hear evidence upon it, and either acquit or convict the accused parties after hearing them. We, therefore, refer back the record to the Magistrate in order that he should proceed as we have indicated.

With regard to the second order given by the Magistrate, after he had stopped the case and adjourned it *sine die*, it appears that the attorney for Mr. Vuillemain asked him to order the accused not to disturb the possession of his client. We think that in a case of this nature the Magistrate had no jurisdiction to give such an order. If it was a recommendation, as suggested by the learned counsel for Mr. Vuillemain in this Court, which he intended to make, of course it may or may not be followed by the defendants; but if it was intended as a judicial order, the Magistrate had no jurisdiction to give it; and if Mr. Vuillemain is further disturbed and he thinks he has a right to obtain an injunction, that injunction must be obtained from the Supreme Court before which the principal action has been entered.

We also think that each party to the case should bear his own costs. We have been asked to decree that the Magistrate was wrong in adjourning the case *sine die*, and at the same time that he should have discharged the prisoners at once, which was the principal part of the case before us. This the applicants have not obtained from the Court and therefore we think they are not entitled to their costs, on the other hand we have held that the second order of the Magistrate should be considered as "pro non scripto,"; we are therefore of opinion that each party should bear his own costs.

SUPREME COURT

APPEAL FROM DECISION OF MASTER—PERSONAL RIGHT—REAL RIGHT—VENDOR—PURCHASER EXCESS OF INTEREST—DEDUCTION—RENUNCIATION—RIGHTS OF THE HEIRS—RIGHTS OF PURCHASER — TIERS-DÉTENTEUR — APPEAL. DISMISSED.

A debtor sold his property to one of his sons, on condition that the purchaser should pay the mortgage debt on the said property.

The property was subsequently seized, when the purchaser tendered the amount of the debt, deducting, however, a considerable proportion thereof, for excess of interest alleged to have been paid by the vendor in his life time.

The Master having disallowed the deduction, on the ground that the vendor by asking his purchaser to pay the whole amount of the debt, must be held to have renounced the right which he may have had of claiming back the interest overpaid, the debtor appealed.

By the Court:

1o. *We cannot, as at present informed, decide that there has been such a renunciation on the part of the vendor.*

2o. *Admitting that the right of claiming back the excess of interest be still in existence, that right is a personal, not a real one. It may still belong to all the heirs of the vendor, but not to the appellant in his capacity of purchaser* (*tiers-détenteur*).

3o. *As a consequence, the appellant, in his capacity of tiers-détenteur, was not entitled to make the deduction from the principal sum due by him.*

Appeal dismissed with costs.

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LEMASSON,—Appellant.

and

DESCUBES,—Respondent.

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Before

His Honor Sir E. J. Leclézio Kt.,—Chief Judge.

and

His Honor A. Mure,—Puisne Judge.

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H. Galéa,—Counsel for Appellant.
V. Ducasse,—Attorney for the same.

V. Delafaye,—Counsel for Respondent.
A. Rohan,—Attorney for the same.

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Record No. 24,607

14*th. December* 1888.

JUDGMENT

Delivered by His Honor The Chief Judge.

This is an appeal from the Master's decision by which he declared insufficient real tenders made by the appellant, in order to put an end to the proceedings in levy of his property seized by the Respondents. It appears that the principal sum due is a sum of Rs. 2000, and the party seised who is the appellant to day, wanted to reduce that sum by deducting from it what he called overpayments of interest made by his predecessors. There is evidence that, during a certain number of years, the former proprietors paid upon that claim 12 per cent interest, instead of 9 per cent, and the pretention of the party who is now the owner of that property, and upon whom the levy has been made for the mortgage claim which is due by him and which he has accepted to pay, is to set off against this claim the difference of interest between 9 and 12 o/o paid by his predecessors. The mortgage claim was due first by Mr. Lemasson senior, then by a man called Lazare, and afterwards by Mr. Lemasson senior himself who sold to the defendant in the year 1877, more than ten years ago. From the account which has been filed and upon which the real tenders are based, it would appear that if the appellant had the right to claim back the interest said to have been overpaid, there would be a rather considerable deduction to be made from the capital sum which is due, but the question is precisely to know whether that right belongs to him. It was argued for the appellant here that that right was a sort of mixed right, participating both of the nature of a real right and of a personal right; but we have no doubt whatever here that the right is a personal right, a personal right which belonged, partly or wholly, to Lemasson senior, which may or may not exist now, or may or may not belong to his heirs, but here we have not the defendant before us in his capacity of heir, but in his capacity of purchaser (of tiers-détenteur), and there is no doubt that it is not a right which attaches to the real property, but a personal right which may or may not belong now

to the heirs Lemasson. As a consequence, the purchaser in his capacity of "tiers-détenteur" is not entitled to make the deduction from the capital sum which is due to him.

It was said that the Master had declared in his judgment, that, in his opinion, Ernest Lemasson, by asking his purchaser to pay that sum and by making a delegation for the payment of that sum, had renounced the right which he may have had at that time of claiming back the amount of interest which was overpaid by him. The Master appears from his decision to have decided that there was a sort of renunciation on the part of Ernest Lemasson to that effect. We are not disposed to share his views to that extent. We do not think that a sale made by Lemasson would imply such a renunciation as far as we are at present informed.

We do not wish, however, to express now any final opinion with regard to the value of the renunciation such as the Master considered it to exist; but the point on which we have no doubt whatever is that the right, if it still exists, is a personal right which may belong to the heirs Lemasson but which has not been transfered with the right of ownership when the property was sold by Lemasson to the appellant, one of his sons, and that this latter, in his capacity of purchaser, has certainly no right to set off a claim of that nature against the capital sum which he had promised to pay.

We must therefore dismiss the appeal with costs.